Supreme Court, U.S.
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No. _____

In The

# Supreme Court of the United States

ANTONIO ACOSTA,

*Petitioner,*

versus

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

In light of *Kyles v. Whitley*, 514 U.S. 419 (1995) and other leading decisions that hold *Brady* encompasses information which, (1) impeaches the quality of an investigation, or (2) is impeaching or derogatory about the major witness, did the holding of the Eleventh Circuit, that the sole law enforcement ear witness in a single ear witness drug conspiracy prosecution whose personnel file contained a complaint by the DEA Office of Professional Responsibility, pertinent to the theft or disappearance of four (4) kilograms of cocaine from a federal courthouse and an arson to cover up the missing cocaine as well as other similar derogatory information, need not be produced nor disclosed render a decision that conflicts with this Court and other circuits and depart from accepted course of judicial proceedings so as to call for the exercise of this Court's supervisory power?

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## PETITION FOR WRIT OF CERTIORARI

Petitioner, Antonio Acosta, petitions for *writ of certiorari* to review the judgments of the United States Court of Appeals for the Eleventh Circuit and the United States District Court for the Middle District of Florida.

## OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is an unpublished, *per curiam* order, reprinted in the Petitioner's Appendix. (Pet. App. 1a-2a). Acosta unsuccessfully sought petition for rehearing and petition for rehearing *en banc*. (Pet. App. 3a-4a). Pertinent district court opinions are also reprinted. (*Id.* at 5a-18a). The Defendant's indictment is premised upon a violation of 21 U.S.C. § 846. (*Id.* at 19a-21a).

## JURISDICTION

The United States Court of Appeals for the Eleventh Circuit affirmed on January 21, 2000 after denying Petition for Rehearing. (Pet. App. 22a). This Court's jurisdiction is respectfully invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

**28 U.S.C. § 2255** reads in pertinent part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the

sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside, or correct the sentence.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

**28 U.S.C. § 1651**. Writs.

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

**(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.**

**United States Constitution, Fifth Amendment.**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## STATEMENT OF THE CASE

The Petitioner is serving a two hundred sixty four (264) month term of incarceration upon his indictment and conviction in the Middle District of Florida. App. 18-19. In 1991, Acosta and others were arrested and charged with conspiracy to possess and intent to distribute a substantial quantity of cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and 846.

Acosta's conviction is premised upon the uncorroborated voice identification of former DEA Task Force Agent Javier Guzman, who is currently serving time in a federal penitentiary.

Although Guzman never personally met Acosta, Guzman did speak by mobile phone with an individual only known by voice to him as "Tobacco." Cumulatively, over an eight day period, Guzman spoke with "Tobacco"

on four occasions amounting to somewhere between five and eight minutes. See, *United States v. Acosta*, Trial Transcript of 4/8/92, pp. 41-42, 46, 48, 50, 58-62, 65, 69, 71, 77-79. (Pet. App. 24a-26a, 27a-31a, 32a-36a, 37a, 40a, 41a-43a). Guzman proposed to deliver drugs to Miami to "Tobacco." DEA agents in Miami set up surveillance outside a restaurant for an expected meeting between "Tobacco" and the informant. Acosta purportedly arrived at the shopping mall, spoke to the informant and was immediately arrested.

As further described below, Acosta's conviction is predicated upon the uncorroborated but unimpeached testimony of Guzman, a jailed and corrupt law enforcement agent. Remarkably, although Guzman was the subject of a complaint filed by the Drug Enforcement Administration, Office of Professional Responsibility ("DEA OPR") and an investigation was conducted by both the Internal Affairs of the Tampa Police Department ("IA TPD") and the DEA OPR in the time period after Acosta's arrest and before his trial testimony against Acosta, no *Brady*-type disclosure was made.

### A. The Guzman In and Out-of-Court Identification of Acosta as "Tobacco."

Although Acosta was arrested in Miami on November 16, 1991, he was only suspected by the DEA to be "Tobacco." Immediately after his arrest, an agent put Acosta (while still in Miami) on a mobile phone and told him to speak to Agent Guzman. Agent Guzman was still in the Tampa area. *United States v. Acosta*, Trial Transcript of 4/8/92, pp. 159-160. (Pet. App. 44a-46a). The estimated

duration of the conversation was about thirty seconds to a minute. *Id.* at p. 160. (Pet. App. 45a-46a.)

On the morning of trial, April 8, 1992, with the defense unaware that Guzman was the target of a criminal investigation, Acosta was ordered to read to Guzman six lines containing three words each. Acosta read the lines twice. This identification procedure took place in the hallway outside of the courtroom. *United States v. Acosta*, Trial Transcript of 4/8/92, p. 70 (Pet. App. 38a-39a).

Premised upon the two foregoing single voice "show-ups", Guzman testified that Acosta and "Tobacco" were one in the same. Guzman's trial testimony recited the substance of his undercover conversations with "Tobacco". That specific trial testimony (later relied upon by the government at closing) served to convict Acosta.

**B. Pre-Trial Motions and *Brady* Issue.**

Prior to trial, the court ordered "any additional information which may be used for impeachment under the Federal Rules of Evidence of a witness whose credibility 'may be an issue at trial' must be produced." *United States v. Acosta*, Case No. 91-324-Cr-T-10(A) M.D.Fla. (Docket Entry 69). The prosecution, through its pleadings, voiced recognition of its obligation to provide information relating to a witness' truth and veracity and that which might discredit or bear upon the credibility of its witnesses. *United States v. Acosta, supra*, DE-44, DE-52-53, DE-64. However, the government made absolutely no *Brady* disclosures with reference to DEA Task Force Agent Javier Guzman.

**C. Post-Trial Revelations Regarding Task Force Agent Javier Guzman.**

Acosta respectfully invites this Honorable Court to take judicial notice of the Middle District of Florida's court records. Those records reflect that Javier Guzman was a Drug Enforcement Administration Task Force Agent (and member of the Tampa Police Department) who, beyond theft of drugs, corruptly engaged in acts of obstruction of justice, witness tampering, and money laundering. See *United States v. Guzman*, Case No. 94-94, Middle District of Florida (DEs-12, 41, 59). Upon best information and belief, documents provided under seal (produced as a result of a Section 2255 subpoena to the DEA OPR but never provided to Petitioner) reflect that Guzman is an arsonist who tried to cover up his theft of four kilograms of cocaine from a trial conducted in the Middle District of Florida in late 1991. He tried to cover up that theft by setting fire to the evidence safe at DEA Headquarters in Tampa, Florida in 1991.

As further described below, the IA TPD and DEA OPR's investigatory files are part and parcel of the undisclosed *Brady* material which if disclosed, would be extraordinarily useful in Acosta's attempt to impeach Guzman's voice identification labeling him "Tobacco."

**D. Substance of Undisclosed DEA OPR and Tampa Police Dept. Internal Affairs' Files Existing at the Time of Acosta's Trial.**

During the course of evidentiary hearing on the Section 2255 Petition, the government admits that every DEA agent in the Middle District of Florida was a "suspect" in

that arson/cocaine theft investigation. Section 2255 Hearing, Tr. p. 11. (Pet. App. 47a-48a.) Copies of IA and TPD documents are filed as exhibits to the evidentiary hearing and are set forth fully in this appendix. These constitute the gravamen of the Petitioner's *Brady* claim.

The Internal Affairs ("IA") files of the Tampa Police Department ("TPD") reflect that on January 14, 1992 Guzman was named as a subject of an investigation involving the disappearance of a large quantity of cocaine and the arson to cover up that theft prior to testifying against Acosta. See *Memo of January 14, 1992 from M.A. Williams, Captain, Internal Affairs to T.A. Depolis, Chief of Police: Subject: Complaint involving Detective Guzman* (disappearance of four kilograms of cocaine). (Pet. App. 58a.)

Some time on or before January 14, 1992, the Drug Enforcement Administration filed a complaint with the Internal Affairs Bureau of the Tampa Police Department with respect to Javier Guzman for conduct occurring in November 1991. That complaint (which refers also to a *January 14, 1992, Notice to J. Guzman from R.E. Pennington)* pertains to the disappearance of the four kilograms of cocaine. Specifically, Guzman was advised of his rights and "treated as a subject officer." Senior Inspector Terrisi (and Brown) of OPR, DEA conducted the investigation. See Pet. App. 59a-62a, *Tampa Police Department, Internal Affairs Bureau, Informational Supplement dated 1/15/92* (Re: DEA complaint against Guzman noting disappearance of cocaine targeting Guzman as suspect.)

Agent Robert Davis provided a written statement in January 1992 pertinent to Guzman's participation in the chain of custody with respect to the four kilograms of

cocaine which had "disappeared." See Pet. App. 63a-66a, *Statement of Robert E. Davis dated January 14, 1992* provided to the Drug Enforcement Administration (which implicates Guzman).

On November 12, 1991, Detective Guzman removed eleven kilograms of cocaine from the DEA vault. During the court case, Detective Guzman had control over the evidence and testified that the exhibit had seven kilograms of cocaine *and not eleven, as represented by AUSA Preston*. As of December 31, 1991, Detective Guzman or Agent Davis was not just a subject but also a target of investigation with respect to the disappearance of the four kilograms of cocaine. See Pet. App. 58a, *Memo dated 1/14/92 from Captain M.A. Williams (Internal Affairs) to T.A. Depolis (Chief of Police)* (noting disappearance of four kilos of cocaine from Guzman).

As evidenced by these internal affairs documents, (Tampa-based) DEA Agent Crawford knew or should have known that Detective Guzman was involved in an investigation concerning the disappearance of multi-kilograms of cocaine from the evidence locker or from the Tampa courtroom. See Pet. App. 67a-72a *Memo dated 3/30/92 from D.N. Morrill (Vice Control Unit) to G. Gonzalez (Chief of Police) (Re: DEA complaint against Guzman.)* This exhibit also establishes again that the DEA lodged a complaint against the prosecution's main witness in the Acosta case prior to Acosta's trial, a fact that was not disclosed to defense counsel.

Interestingly, shortly after Acosta's trial, in May of 1992, Guzman claimed that he was still a suspect and target of investigation by the DEA with respect to the

missing cocaine and related arson. See Pet. App. 73a-75a, *Memo dated 5/5/92 from M.C. George (Vice Control Unit) to W.A. Sawyer (Tactical Division).* Guzman provided a statement to the Tampa Police Department reflecting that he was a suspect from November 1991 through May of 1992 in the fire bombing of a DEA evidence locker and the theft of four (4) kilograms of cocaine and explained his recent "failure to report for duty" based upon that stress. See *Memo from J. Guzman to W.A. Sawyer (Tactical Division) dated May 6, 1992 Subject: Incident on May 1, 1992.* (Pet. App. 76a-80a.) Notwithstanding the seriousness of the OPR and TPD investigation, *nothing* was revealed to the Defendant.

Coincidently, just one week prior to Guzman's trial testimony against Acosta, an administrative determination was made by IA of the Tampa Police Department recommending to the Chief of Police that the allegations against Guzman were unfounded. See Pet. App. 81a. Subsequent to Acosta's trial, IA TPD so advised OPR of the DEA. See *Letter of April 14, 1992 from M.A. Williams, Captain Internal Affairs to Inspector Brown, DEA.* (Pet. App. 81a).

Finally, Guzman's personnel file makes clear that he was also disciplined two years before the "Acosta is Tobacco voice identification" as a consequence of executing a search warrant at the wrong house. The execution of the search warrant at the wrong address and the wrong house is certainly analogous to misidentifying a voice heard in two brief conversations. See *September 5, 1989 Memorandum from T.C. Slater, Sgt. To J.W. Guzman Det. Subject: Letter of Counseling* ("your incorrectly identifying a location . . . suspected as being involved in illegal

narcotic activities . . . the execution of the search warrant at the wrong location placed the members of their Raid Team . . . in a precarious situation") (Pet. App. 82a-83a).

*Brady*-type evidence may also exist in the sealed DEA OPR file, notwithstanding the fact that none of this evidence was ever disclosed to Acosta prior to his April 1992 trial, at his Section 2255 proceeding, or during his appeals.

## ANTONIO ACOSTA TIMELINE

| | |
|---|---|
| Nov. 7, 1991 | Guzman speaks to "Tobacco" money and drug transportation discussed. Duration 30 seconds – 3 minutes. |
| Nov. 12, 1991 | Guzman removes 11 kilograms of cocaine from the DEA vault (M.D.Fla.) 4 kilograms of cocaine are stolen. |
| Nov. 15, 1991 | Agent Guzman receives call from "Tobacco" discuss drug deal. Estimated duration is 5 minutes. |
| Nov. 16, 1991 | Agent Guzman speaks to "Tobacco" for approximately 5 minutes. |
| Nov. 16, 1991 | Acosta is arrested in Miami, believed to be "Tobacco," and Miami DEA agent orders Acosta to speak on telephone with Guzman, in Tampa, estimated time – 30 second – 1 minute. |
| Jan. 14, 1992 | DEA files complaint with Tampa Police Department with respect to Guzman's November 1991 misconduct – disappearance of 4 kilograms of cocaine. Internal Affairs of TPD begins investigation. |

| | |
|---|---|
| Jan. 14, 1992 | Agent Robert Davis provides written statement concerning chain of custody with regard to 4 kilograms of cocaine. |
| Jan. 14, 1992 | Agent Guzman advised of his rights and "treated as subject officer." |
| Mar. 30, 1992 | Recommendation from IA TPD to TPD Chief of Police that Guzman be cleared of the theft of the 4 kilograms of cocaine. |
| Apr. 3, 1992 | Deputy Chief concurs with IA recommended disposition. |
| Apr. 6, 1992 | Agent Guzman, shortly before trial, identifies Acosta's voice as that of "Tobacco" in the hallway in a court ordered voice identification one-voice show-up. |
| Apr. 8-9, 1992 | Jury Trial, *United States v. Acosta*, Case No. M.D.Fla. Acosta convicted |
| Apr. 14, 1992 | Just subsequent to Acosta's conviction the TPD IA formally advises DEA OPR that Guzman has been cleared of all charges. |

## I.

## RELEVANT SECTION 2255 TESTIMONY

A brief recitation of the Section 2255 evidentiary hearing testimony highlights the factual basis for the issue upon which certiorari is sought.

### A. Section 2255 Testimony of Acosta's Trial Counsel.

With regard to the Defendant's post-conviction *Brady* claim, Acosta's trial counsel claimed that because Guzman's testimony was "key" to Acosta's conviction, Section 2255 Hearing, Tr. p. 14 (Pet. App. 48a-49a), the undisclosed evidence was crucial to his defense of misidentification. Defense counsel claimed that if Guzman was a suspect in the theft of cocaine or the arson, a good faith claim could be made at trial that his testimony was colored, "to show a bias, interest, or motive on his part maybe to curry favor with the government because of the investigation." Section 2255 Hearing, Tr. p. 18 (Pet. App. 49a-50a). Moreover, defense counsel claims that had the prosecution revealed disciplinary action taken against Guzman because he executed a search warrant at the wrong address, this would have served the defense interest to show, (1) a lack of investigatory competence as an agent, resulting in, (2) a jury argument tying misidentification of the Acosta voice to prior misidentification of the house where a search was conducted in an argument to the jury. Section 2255 Hearing, Tr. pp. 19-20 (Pet. App. 50a-52a).

#### 1. Testimony of William Jung – Acosta's 1992 Prosecutor and Present Criminal Defense Attorney.

Acosta's trial prosecutor, William F. Jung, testified that had he known that Tampa Police Department had filed a complaint with Internal Affairs about Guzman, he would have disclosed it *in camera* to the trial court or reviewed the issue with his supervisor. Section 2255 Hearing, Tr. p. 63 (Pet. App. 52a-53a). Jung recognized

that any "complaint against Guzman would have required that it be turned over to the court . . . and I think everybody in the U.S. Attorneys Office" was aware of the arson investigation. Section 2255 Hearing, Tr. p. 64 (Pet. App. 53a-54a). Somewhat in contradiction to his earlier claim of what he would do with such evidence, Jung claimed that all DEA agents in the Middle District of Florida were "under investigation because everybody had a key to that office," Section 2255 Hearing, Tr. p. 65 (Pet. App. 54a-55a), referring to the DEA office where the arson was committed. Although "Guzman was amongst those agents under investigation, nothing of the like was disclosed to defense counsel." Section 2255 Hearing, Tr. p. 66 (Pet. App. 55a-56a). Jung agreed that the reason he sought a last-minute court order compelling Acosta to speak with agent Guzman in the hallway of the court-room was his need to further verify the out-of-court identification which was based on a single telephone voice post-arrest out-of-court show-up. Section 2255 Hearing, Tr. p. 70 (Pet. App. 56a-57a).

Against governing law and in conflict with other circuits, the underlying order from the United States Court of Appeals for the Eleventh Circuit concludes "the government did not possess at the time of Acosta's trial the information that Acosta contends was improperly withheld moreover, even if the government possessed the information and withheld it, we doubt *Brady* would have been violated because the information was not material." *Acosta v. United States*, U.S. Court of Appeals for the Eleventh Circuit, Case No. 99-2044, pp. 2-3.

## II.

## REASONS FOR GRANTING THE WRIT

The opinion of the United States Court of Appeals is in conflict with decisions of other courts of appeals on the very important *Brady* issue. Moreover, the decision has so far departed from accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

The Defendant's indictment and conviction on this drug trafficking charge is entirely based on the testimony of Javier Guzman. Guzman, a corrupt officer, provided a voice identification from extraordinarily limited conversations and two single voice show-ups. With only the corrupt officer's testimony to rely on, the prosecution was so unsure of its ability to obtain a valid identification at trial, that shortly prior to trial it sought an order compelling Acosta to speak with the now jailed officer, one on one, in the hallway of the courtroom. Based upon the initial single post-arrest telephonic identification as well as the courtroom single voice show-up, the officer testified unimpeached, that Acosta and "Tobacco" are one in the same. As a result, the Defendant received the functional equivalent of a life sentence.

Remarkably, notwithstanding the personnel file information described above, no *Brady* disclosures were made to defense counsel. However, as the record now clearly indicates, the prosecutor (Jung) was well aware that Agent Guzman was a "suspect subject" of an investigation by the DEA OPR and IA TPD concerning the disappearance of a substantial amount of cocaine from the federal courthouse in the Middle District of Florida in

November of 1991, the same month Acosta was arrested. Guzman had been named the subject of an investigation by the DEA OPR which resulted in an IA TPD complaint and investigatory file commencing in December of 1991. The impeaching quality of the contents of those files are further described in this application.

Under these facts, the conclusion of the court of appeals that, (1) the government did not possess the Tampa Police Department Internal Affairs file, and (2) neither the DEA OPR complaint, nor the TPD IA file constitutes *Brady*-evidence conflicts with the law of other circuits. This decision departs from the accepted and usual course of judicial proceedings so as to call for the exercise of this Court's supervisory power.

## III.

## ARGUMENT

**In light of *Kyles v. Whitley*, 514 U.S. 419 (1995) and other leading courts of appeals decisions holding that *Brady* encompasses information which, (1) impeaches the quality of an investigation, or (2) is impeaching or derogatory about the major witness, did the holding of the Eleventh Circuit, that the sole law enforcement ear witness in a single ear witness drug conspiracy prosecution whose personnel file contained a complaint by the DEA Office of Professional Responsibility, pertinent to the theft or disappearance of four (4) kilograms of cocaine from a federal courthouse and an arson to cover up the missing cocaine as well as other similar derogatory information, need not be produced nor disclosed render a decision that conflicts with this Court and other circuits and depart from accepted course of**

**judicial proceedings so as to call for the exercise of this Court's supervisory power?**

**A. The Court of Appeals has Departed from the Accepted and Usual Course of Judicial Proceedings so as to Call for the Exercise of this Court's Power of Supervision.**

Acosta respectfully invites this Honorable Court to summarily reverse the Court of Appeals Order. This Court's Rule 10 provides:

> **Consideration Governing Review on Certiorari**
>
> The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the court considers
>
> (a) A United States court of appeals . . . has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power.[1]

As further argued here, the conclusion of the court of appeals that: (1) the Tampa Police Department nor Drug Enforcement Administration nor its Office of Professional Responsibility possessed the referenced *Brady*-type evidence at the time of Acosta's trial and, (2) the information (describing an internal investigation of the sole ear-witness who provides testimony concerning the *corpus delicti*

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[1] See *New York City Transit Authority v. Beazer*, 440 U.S. 568 (1979) (court reverses Second Circuit's decision that Equal Protection Clause of the Fourteenth Amendment is violated by the Transit Authority's refusal to employ persons who use methadone).

of the crime) was not material, seriously departs from the accepted and usual course of judicial proceedings so as to require immediate review.

In the historic context of the evolution of the *Brady* rule, as well as the overriding importance of the Due Process Clause of the Fifth Amendment to a defendant's right to a fair trial it is important for this Honorable Court to intercede. Simply stated, the rule articulated in *Kyles*, supra was not implemented in this case. In *Kyles*, this Court concludes: " . . . [T]he individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case including the police." *Kyles* at 437. *Kyles* also contains an interesting and useful discussion of the type of information that may constitute exculpatory evidence under *Brady*. The *Kyles* majority expressly recognizes that it is appropriate for a defense to put the police on trial and to "discredit the caliber of the investigation." *Id.* at 515.

Notwithstanding (1) this Honorable Court's decision in *Kyles v. Whitley* holding that a prosecutor must disclose to the defense evidence in the government's possession that tends to exculpate the defendant, (2) *Kyles'* premise which places squarely on the individual prosecutor the duty of personally becoming aware of *Brady* material in the possession of other government actors, and (3) former AUSA Jung's admission that he well knew that Guzman was a suspect in a drug theft and arson in the federal courthouse in the Middle District of Florida, the court of appeals has ignored this *Kyles* holding on these facts.

Indeed in *Kyles*, this Court explicitly notes *Brady* applies not only to information that might impeach a

specific witness' testimony, such as a prior inconsistent statement by that witness, but also extends the statements and other evidence that raises questions about the reliability or integrity of the police investigation or the credibility of the investigating officers. The decision below begs the question: Why did the court of appeals reject this Court's guidance as applied to the files of the sole voice identification witness who was the subject of a serious investigation?

After all, federal inmate Guzman was under investigation for stealing four kilograms of cocaine from the federal courthouse in the Middle District of Florida and committing an arson to attempt to cover up that crime from January 1991 through April 1992. Acosta was accused of a crime commencing in November of 1991 and was tried in November of 1992.

Justice Souter specifically notes that *Brady* includes information that may tend to "discredit the caliber of the investigation or the decision to charge the defendant," or that carries "the potential . . . for the . . . discrediting . . . of the police methods employed in assembling cases." *id* at 515, quoting from *Bowen v. Maynard*, 799 F.2d 593, 613 (10th Cir. 1986) and *Lindsey v. King*, 769 F.2d 1034, 1042 (5th Cir. 1985).

Evidence regarding the integrity or competence of the investigating officer (including such information in confidential personnel files or review board investigation files as here), clearly comes within the ambit of *Brady* as explained in *Kyles*. All such information and anything that calls into question the reliability of the investigation

fits within *Kyles'* description of *Brady* material. However, the lower court disregarded these precepts.

It is monumentally important to emphasize that the crucial convicting testimony came from the mouth of a single, albeit corrupt, law enforcement official. That testimony was not eyewitness. Rather, it was fleetingly earwitness participation. Two single voice show-ups stood unimpeached because the prosecution failed to disclose extraordinarily impeaching evidence from the DEA, TPD, IA or DEA OPR files which go directly to the integrity and competence of that investigating officer. The law requires more from the prosecution team. The law requires more from the lower courts. It bears repeating that the same crucial impeaching evidence which is set forth in the appendix was maintained within Agent Guzman's personnel files by both the Tampa Police Department and the DEA. As part of the Appendix, the petitioner has placed a copy of the *State and Local Task Force Agreement dated October 1991 between the Drug Enforcement Administration and Tampa Police Department.* (Pet. App. 84a-88a).

Even preceding this drug, theft, and arson investigation and his complicity thereto, officer Guzman was previously disciplined for executing a search warrant at the wrong house. See *Letter of Counseling dated September 5, 1989 from T.C. Slater to J.W. Guzman* (Pet. App. 82a-83a).

The importance of accepting *certiorari* in this case will reflect the importance which this Court places upon the Due Process Clause of the Fifth Amendment while preserving the historic Due Process Clause doctrine of a

prosecutor's disclosure duty described in *Brady v. Maryland*, 373 U.S. 83 (1963) in the context of federal criminal prosecutions.

This court in *Brady v. Maryland* held a death sentence invalid under the Due Process Clause because of prosecutorial non-disclosure of exculpatory evidence. Brady and his accomplice were convicted of first-degree murder and sentenced to death. *Brady v. Maryland*, 373 U.S. at 84. Before trial, Brady's counsel had requested that the prosecution furnish extra judicial statements of Brady's accomplice. The prosecutor disclosed all such statements except one in which the accomplice admitted killing the victim. Although Brady admitted he participated in the crime, he denied that he had done the actual killing. This Court held that the prosecutor's failure to disclose the statement denied Brady due process because the jury may have imposed the death penalty had they believed that Brady himself had not killed the victim. This Court announced the general rule that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material whether to guilt or punishment, irrespective of good or bad faith of the prosecution." *Brady*, 373 U.S. at 88.

Later, in *Giglio v. United States*, this Court, unanimously, reversed a forgery conviction because the prosecutor failed to disclose an offer of immunity to his key witness in exchange for his testimony. 405 U.S. 150 (1972). The Court held that the suppressed evidence was material under *Brady* because "false testimony could . . . in any reasonable likelihood have affected the judgment of the jury." 450 U.S. at 150-154. *Kyles* further defined the prosecution's obligations. Here, Acosta was deprived of the

opportunity to present the jury with information showing bias and motivation to color testimony on behalf of the DEA, like in *Giglio*. The withheld evidence was favorable to Acosta's claim of misidentification like the non-disclosed statement in *Brady*.

We now know, as evidenced by documents contained within Guzman's personnel file, the officer was severely depressed, having missed his work assignments in May 1992. Guzman's depression was "related to the investigation of the Drug Enforcement Administration Office fire and the possibility of missing cocaine from the vault in which he stated he was a suspect in. He stated this was causing a lot of stress. . . . The detective Guzman advised that he couldn't function . . . " See Pet. App. 104a-105a, *Memo Dated 5/5/92 from M.C. George (Vice Control Unit) to W.A. Sawyer (Tactical Division TPD)*. Evidence concerning the Internal Affairs investigation of Guzman from January 1990 through Acosta's trial in April of 1992 should have been made available to the Defendant. Clearly, *Brady*, *Giglio*, and *Kyles* so require. This is why the lower court's decision is so extraordinary and falls within the very exceptional jurisdiction of this Court to intercede.

The information concerning the investigation of the arson and drug theft was simultaneous to Acosta's prosecution. The drug theft occurred in the same month of Acosta's arrest and the investigation continued through Acosta's trial. Acosta clearly would have been permitted to use undisclosed information to cross-examine Guzman on his bias. After all, Guzman was testifying on behalf of the same agency, the Drug Enforcement Administration, who had placed him under investigation, during the same period of time he is testifying.

Here, there was no other impeachment of the government witness and the evidence of Acosta's guilt was extraordinarily slight. Therefore, the impeachment material must "put the whole case in such a different light as to undermine confidence in the verdict." *Kyles v. Whitley*, 514 U.S. 419, 435 (1995).

Guzman was deprived of the opportunity to allow the fact finder to evaluate his motives and credibility. Certainly, the jury was entitled to know that beyond his status as a "law enforcement agent" Guzman had a motivation to curry favor with the same law enforcement agency, the DEA and the Tampa Police Department, which had placed him under investigation. Under *Giglio v. United States*, 405 U.S. 150 (1972), impeachment information, is considered "*Brady* material" because such material allows the fact finder to evaluate motives and credibility on cross-examination. *Id.* at 154-55. Evidence that could call into question good faith of the investigation is considered "material." *Kyles*, 514 U.S. at 445.

Both this Court and the lower courts have found that bureaucratic boundaries are too weak to limit the disclosure duty. However, this is the implicit finding of the Eleventh Circuit here. See, *Kyles*, 514 U.S. 419, 447 (1995) ("by demonstrating the detective's knowledge of Beanie's affirmatively self-incriminating statements, the defense could have laid the foundation for a vigorous argument that the police had been guilty of negligence. . . . Since the police admittedly never treated Beanie as a suspect, the defense could thus have used his statements to throw the reliability of the investigation into doubt *and to solely sully the credibility of Detective Dillman*, . . . ") (Italics added).

**B. Other than the Eleventh Circuit, the Remaining Federal Circuit Courts of Appeals Use a Separate and Distinct Standard to Determine Whether the Government Possesses *Brady*-Type Information in the Context of a DEA Task Force Agent Assigned to a Local Police Department.**

The Eleventh Circuit has taken a serious departure from the course of the other circuits, where there is consensus that impeaching personnel file information must be disclosed when necessary to safeguard a Defendant's due process right. The underlying court opinion appears to repudiate that concept. Therefore, the Petitioner respectfully invites this Honorable Court to accept *certiorari* in this matter. It appears that the lower court's decision repudiates the government's obligation to disclose impeachment evidence notwithstanding governing law to the contrary, which clearly makes this case ripe for review by this court. See *Giglio v. United States*, 405 U.S. 150, 154 (1972); *United States v. Bagley*, 473 U.S. 667, 676-77 (1985) (plurality opinion) (impeachment evidence as well as exculpatory evidence subject to *Brady* disclosure; no distinction should be made with respect to constitutional disclosure requirements.)

In 1995, this Court reversed the Fifth Circuit's conclusion that there was no *Brady* violation as a result of the failure to disclose information known to the police, but not to the prosecution. *Kyles v. Whitley*, 115 S.Ct. 1555, 1568 (1995).

There is no appropriate distinction between the TPD and the DEA while they worked together, hand in hand, under a State and Local Task Force Agreement. Likewise, the admission of the prosecuting assistant that he, too,

knew that Guzman was a suspect in the arson and drug theft required *Brady*-type disclosure.

Clearly, this Court long ago established that the government's duty to disclose is not limited to only that information in the possession of or known to the prosecutor; the duty extends to the police and investigators and other investigatorial arms of the State teamed with the prosecutors on the particular case. *Kyles*, supra, at p. 1567 ("The individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf of the case, including the police").

**1. Conflict in Circuits.**

Other circuits, except for the Eleventh Circuit follow this clear dictate. Other than the decision of this particular court of appeals, the remaining federal circuit courts of appeal have accepted the due process clause requirement that the government must disclose impeachment evidence and has found due process violations when the government fails to do so under the Fifth Amendment as interpreted in *Kyles*. See *United States v. Kiszewski*, 877 F.2d 210, 215-16 (2nd Cir. 1989) (due process may have been violated by prosecution's failure to disclose FBI agent's personnel file containing allegations of professional misconduct; on remand, trial judge to conduct *in camera* inspection of file rather than rely on prosecution's representation as to its lack of utility); *United States v. Morelle*, 524 F.2d 550, 555 (2nd Cir. 1975) (prosecutor obligated to turn over *Brady* material to DEA agent where

agent has served as an "arm of the prosecutor" by supervising informant, participating actively in the investigation, and sitting at prosecutor's table); *United States v. Pelullo*, 105 F.3d 117, 123 (3rd Cir. 1997) (due process violated by failure to produce FBI agent's rough notes and FBI surveillance tapes because evidence could have been used to impeach key government witness whose credibility was central to case); *United States v. Kelly*, 35 F.3d 929, 937 (4th Cir. 1994) (due process violated by failure to disclose search warrant affidavit describing witness' suspicious banking activity, secret security guard jobs, and cult membership because such information could have been used to impeach witness in close case); *East v. Johnson*, 123 F.3d 235, 137-40 (5th Cir. 1997 ) (due process violated by failure of prosecution to reveal paranoia and hallucinations of star witness, who testified during sentencing phase of capital murder trial); *United States v. Frost*, 125 F.3d 346, 381-85 (6th Cir. 1997) (due process may be violated by government misrepresentation to defendant of nature of testimony of potential government expert witness), *cert. denied*, 119 S.Ct. 40 (1998); *United States v. O'Conner*, 64 F.3d 355, 359-60 (8th Cir. 1995) (*per curiam*) (due process violated by failure to disclose witness' attempt to influence testimony of another witness during trial because witness' testimony only evidence against defendant); *Carriger v. Stewart*, 132 F.3d 463, 479-80 (9th Cir. 1997) (due process violated by government nondisclosure of corrections file of star witness, which revealed witness' six felony convictions, history of lying to police, and history of blaming his crimes on others), *cert. denied*, 118 S.Ct. 1827 (1998); *Ballinger v. Kerby*, 3 F.3d 1371, 1376 (10th Cir. 1993) (due process

violated by failure to produce possible impeaching photos of crime scene because they would have buttressed defense that witness could not have seen out of windows in order to identify defendant); *Smith v. Secretary of New Mexico Department of Corrections*, 50 F.3d 801, 824 (10th Cir. 1995) ("investigative officers are part of the prosecution, [and] the taint on the trial is no less if they, rather than the prosecutors were guilty of non-disclosure") (citations omitted), *cert. denied sub nom. Mondragon v. Smith*, 116 S.Ct. 272 (1995); *United States v. Lichtenstien*, 660 F.2d 432, 436 (10th Cir. 1981) (The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts (including personnel file information), within the framework of the rules of evidence); see also, *United States v. Brooks*, 966 F.2d 1500, 1503-04 (D.C. Cir. 1992) (finding duty to search personnel and internal affairs file of Washington Metropolitan Police); *United States v. Cuffie*, 80 F.3d 514, 518-19 (D.C. Cir. 1996) (due process violated by government's failure to disclose evidence of witness' prior perjury even though witness had already been impeached on bases of cocaine addiction, cooperation with prosecution, incentives to lie, and violation of oath as police officer; "undisclosed impeachment evidence can be immaterial because of its cumulative nature only if the witness was already impeached by the same kind of evidence").

**2. Guzman was a DEA Task Force Agent.**

In this particular case, the Tampa Police Department extended to the DEA the use of Javier Guzman. Guzman testified against Acosta as a DEA Task Force agent. The

interrelatedness of the Tampa Police Department and the Drug Enforcement Administration in the Tampa area is evidenced by the working relationship between the Office of Professional Responsibility of the DEA and the local agents, themselves, in conjunction with members of the Tampa Police Department. This reflects that the limited bureaucratic boundary does not set *Brady* parameters. The Tampa Police Department was deeply involved in Guzman's cases and acted (along with the DEA) as supervisory officers of Guzman as well as an investigatory arm of the prosecution. See *Kyles v. Whitley*, 115 S.Ct. 1555 at 1568; *United States v. Morelle*, 524 F.2d 550, 555 (2nd Cir. 1975) (prosecutor obligated to turn over *Brady* material to DEA agent where agent has served as an "arm of the prosecutor" by supervising informant, participating actively in the investigation, and sitting at prosecutor's table); *United States v. Herring*, 83 F.3d 1120, 1122 (9th Cir. 1996); *United States v. Kelly*, 35 F.3d 929, 938 (4th Cir. 1994) (evidence concerning witness credibility must be disclosed; case reversed for failure to disclose false affidavit and letter that "could have been used to attack . . . credibility"); *United States v. Pelullo*, 105 F.3d 117, 122-24 (3rd Cir. 1997) (undisclosed evidence that could undermine credibility of witness testing mandates reversal); *United States v. Deutsch*, 475 F.2d 55 (5th Cir. 1973) ("The burden is on the government to produce, not the defendant.").

Very recently, the Third Circuit noted that it was appropriate for the court to personally review the arresting officer's personnel file when it was learned that an unrelated case was dismissed "amid allegations that Cassedy had committed misconduct on a [separate] drug

investigation." *United States v. Dent*, 149 F.3d 180, 191 (3rd Cir. 1998). Here, a similar result should have followed. The Office of the United States Attorney for the Middle District of Florida, knowing of the DEA OPR investigation, knowing of Guzman as a generalized "suspect," knowing that Guzman's ear-identification testimony served as the most compelling evidence against Acosta, was required to disclose that information, at least *in camera*. Its failure to do so prevented the defendant from receiving a fair trial or a fair review on appeal.

## IV.

## CONCLUSION

The Tampa DEA, DEA OPR, and TPD, and the Tampa Office of the United States Attorney for the Middle District of Florida as well as AUSA Jung all knew about the investigation of Guzman, a liar, thief, and drug suspect prior to Acosta's trial. Guzman testified while seeking to curry favor with the DEA.

By its decision below, the lower court has chosen to ignore the line of Fifth Amendment Due Process Clause based decisions of the Supreme Court including *Brady*, *Giglio*, and *Kyles*. By its decision below, the lower court repudiates the precedent of nearly each and every other circuit in the context of holding that derogatory personnel file information of the major or sole government witness must be disclosed. Under these circumstances there is overriding importance to exercise this Court's supervisory power in order to insure the uniform application of its precedent and to see the fair and consistent

administration of justice. This case does merit the immediate consideration of this Court. Therefore, the Petitioner respectfully seeks the grant of this Petition for Writ of Certiorari.

Respectfully submitted,

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Miami Beach, FL 33139
(305) 673-3737
Fax: (305) 534-5470

## APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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No. 99-2044
Non-Argument Calendar

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(Filed Oct. 29, 1999)

D. C. Docket No. 96-00267-CIV-T-23A

ANTONIO ACOSTA,
a.k.a. Tobacco,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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Appeal from the United States District Court
for the Middle District of Florida

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(October 29, 1999)

Before BIRCH, DUBINA and BARKETT, Circuit Judges.

PER CURIAM:

This is an appeal from the district court's order denying appellant Antonio Acosta's ("Acosta") motion to vacate, set aside, or correct his sentence filed pursuant to 28 U.S.C. § 2255. An evidentiary hearing was conducted by a magistrate judge on Acosta's motion. Subsequently, the magistrate judge issued a report and recommendation

recommending that the district court deny Acosta's motion. The district court adopted the magistrate judge's report and recommendation and denied Acosta's motion.

After reviewing the record, we conclude that Acosta's claim of ineffective assistance of counsel fails because he has not established that his lawyer's representation fell below an objective standard of reasonableness or demonstrated a reasonable probability that, but for his lawyer's unprofessional errors, the result of the proceeding would have been different. *See Strickland v. Washington*, 466 U.S. 668 (1984).

Acosta also claims that the government withheld material impeachment evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). The record demonstrates, however, that the government did not possess at the time of Acosta's trial the information that Acosta contends was improperly withheld. Moreover, even if the government possessed the information and withheld it, we doubt *Brady* would have been violated because the information was not material.

Because all of the claims made by Acosta in his appeal are meritless, we affirm the district court's order denying Acosta's section 2255 motion.

AFFIRMED.

**United States Court of Appeals**
For the Eleventh Circuit

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No. 99-2044

Non-Argument Calendar

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District Court Docket No. 96-00267-CIV-T-23A

(Filed Oct. 29, 1999)

ANTONIO ACOSTA,
a.k.a. Tobacco,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

---

Appeal from the United States District Court
for the Middle District of Florida

---

Before BIRCH, DUBINA and BARKETT, Circuit Judges.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was taken under submission by the Court upon the record and briefs on file, pursuant to Eleventh Circuit Rule 34-3;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the order

of the said District Court appealed from in this cause be and the same is hereby AFFIRMED.

Entered: October 29, 1999
For the Court:
Thomas K. Kahn, Clerk

By: /s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: DEC 06 1999

RE-ISSUE MANDATE: FEB 16 2000

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ANTONIO ACOSTA,

Petitioner,

-vs-

UNITED STATES OF AMERICA,

Respondent.

_____/

Case Nos.
96-267-CIV-T-23A
91-324-Cr-T-23A

**ORDER**

Before the Court is the defendant's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 (Doc. 208). Pursuant to 28 U.S.C. § 636, the magistrate judge considered this matter and filed a report and recommendation (Doc. 221). The defendant filed objections to the report and recommendation (Doc. 223).

Upon consideration, the objections are **OVERRULED** and the magistrate judge's report and recommendation is **ADOPTED** and **INCORPORATED** in this order. Accordingly, the defendant's motion is **DENIED**. The Clerk is directed to close the civil action and enter judgment accordingly.

ORDERED in Tampa, Florida, on December 4th, 1998.

/s/ Steven D. Merryday
Steven D. Merryday
UNITED STATES DISTRICT JUDGE

cc: Magistrate Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

v.

ANTONIO ACOSTA

_____/

CASE NO.
96-262-CIV-T-23A
91-324-CR-T-23A

## REPORT AND RECOMMENDATION

The Defendant makes two claims in his motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255: first, he contends he received constitutionally ineffective assistance of counsel at the pretrial and trial stages; and second, he asserts the government violated his Fifth Amendment guarantees by withholding *Brady* information which could have impacted upon the "credibility, bias or criminality" of an undercover agent who testified at the trial (doc. 208, p. 12). United States District Judge Steven D. Merryday referred the matter to me with directions to conduct such hearings as necessary and to prepare a report and recommendation on the matter. After conducting an evidentiary hearing, I find the Defendant's claims to be without merit and recommend the § 2255 motion be dismissed.

### *A. Background*

In September 1991, DEA contract pilots posing as narcotics transporters flew to Colombia and picked up 521 kilograms of cocaine for delivery into the United

States. After the load's arrival in the United States, drug distributors contacted an undercover agent to arrange deliveries of portions of the drugs. On November 7, 1991, Rafael Mendoza paged undercover task force agent Javier Guzman from a pay phone in Miami to ask about delivery of 150 kilograms of cocaine. Guzman returned the call and spoke to Mendoza and to another individual identified to the agent as "Tobacco." During the call, "Tobacco" urged Guzman to bring the cocaine to Miami for $600,000 in return.

After an aborted attempt to deliver the cocaine in Miami the next day, "Tobacco" telephoned Guzman the following week to complete the deal. In that conversation, "Tobacco" agreed to send Mendoza to Sarasota with $100,000 for 30 kilos of cocaine. He also agreed to show Guzman's confidential informant the remainder of the money before Guzman released the balance of the load, 120 kilos, to Mendoza.

On November 16, Mendoza, Alvarez-Roman, and Marina Hernandez arrived at a McDonald's restaurant in Sarasota as instructed. Guzman told the group that he did not have the cocaine with him and suggested a change in plans. Instead, Guzman proposed to deliver the drugs in Miami where, he explained, they had remained since the aborted delivery attempt. Alvarez-Roman, who Guzman knew as "Tobacco's" brother-in-law, and Hernandez, introduced as "Tobacco's" sister, insisted on calling "Tobacco" for approval. Using the agent's cellular phone, the two telephoned "Tobacco." Once more, Guzman conversed with "Tobacco," who approved the new plan. In a later call, "Tobacco" described to the agent the truck he

would be driving to meet the informant, a white truck with red pinstripes and trash in the bed.

DEA agents in Miami set up surveillance outside a restaurant for an expected meeting between "Tobacco" and the confidential informant. The agents spotted Acosta and the informant and observed Acosta leave in a truck that matched the description he had given to Guzman. Acosta stopped at a house momentarily and then drove to a shopping mall to meet the informant. After the two spoke, agents arrested Acosta and seized $4,000 stashed in his pocket. A DEA agent then placed him on the phone and had him speak briefly to Guzman. Guzman identified Acosta as "Tobacco"; the agent later reaffirmed his recognition of Acosta's voice in a show-up just before the trial.

Agents in Sarasota also arrested Mendoza, Alvarez-Roman, and Hernandez. Not only did the agents find the purchase money, they also discovered a card in Alvarez Roman's possession bearing Acosta's telephone number. Phone records added to the government's proof that "Tobacco" and Acosta were the same person. Mendoza and "Tobacco's" initial call to Guzman about the load emanated from a pay phone near the house where DEA agents had spotted Acosta. Guzman's cell phone records also proved that Alvarez-Roman called Acosta's business in Miami about the change in plans.

After a two-day trial, a jury found Acosta, Alvarez-Roman, and Hernandez guilty of conspiracy to possess cocaine with intent to distribute in violation of 21 U.S.C.

§ 846.[1] Acosta appealed his conviction and raised four issues: (1) insufficiency of the evidence; (2) the court committed plain error when it permitted Guzman to identify him by his voice; (3) the prosecutor's remarks about the confidential informant in closing argument denied him a fair trial; and (4) the court erred in finding him a leader or organizer of five or more persons. A panel of the Eleventh Circuit affirmed his conviction (pursuant to 11th Cir. R. 36-1).

*B. Defendant's Contentions:*

Defendant makes two distinct claims in his § 2255 application. First, he contends his trial lawyer, Dennis Urbano, provided constitutionally ineffective assistance by not moving to suppress "Guzman's ear witness identification and [failing] to utilize expert testimony" and by not objecting to the prosecutor's comment in closing argument that defense attorneys are "tasked with obscuring the truth and in trying to prevent the guilty verdicts from resulting." Second, the Defendant argues the government violated his Fifth Amendment due process guarantees by withholding *Brady* information about Guzman: namely, that DEA had lodged a complaint with the Tampa Police Department at least two months before the trial about Guzman's mishandling of a drug exhibit in an unrelated trial. This information, the Defendant contends, "had a reasonable likelihood of effecting the outcome of the case as it pertained to [Guzman's] credibility, bias, or

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[1] Mendoza pleaded guilty and agreed to cooperate. The government, however, did not call him as a witness at the trial.

criminality." *See* Joint Pretrial Statement at doc. 208, pp. 11-12.[2]

C. *Discussion*

*1. ineffective assistance of counsel*

Under the guise of an ineffective assistance claim, the Defendant is still essentially complaining about two of the issues he unsuccessfully argued in his direct appeal: the legality of the pretrial voice identification procedures and the appropriateness of prosecutorial remarks in closing argument. Putting aside any law of the case or procedural bypass considerations, the Defendant's arguments are without merit even under the moniker of an ineffective assistance claim.[3]

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[2] At the evidentiary hearing, the Defendant withdrew the remaining issues listed in his Joint Pretrial Statement (*see* ¶ 11(A)(1), (3), and (4)).

[3] Notably, Acosta complained about Guzman's voice identification and the prosecutor's remarks in his direct appeal. Nonetheless, the government did not urge in the Joint Pretrial Statement the doctrines of law of the case or procedural bypass although both apply. The law of the case doctrine prohibits a defendant from litigating the same issues in his direct appeal and § 2255 application. *See Murchu v. United States*, 926 F.2d 50, 55 (1st Cir. 1991); *United States v. Jones*, 918 F.2d 9, 10-11 (2d Cir. 1990); *United States v. Mazak*, 789 F.2d 580, 581 (7th Cir. 1986); *United States v. Smith*, 843 F.2d 1148, 1149 (8th Cir. 1988). Also, a defendant must usually advance available challenges to a criminal conviction or sentence on direct appeal or else the issues will be considered procedurally barred in a § 2255 proceeding. An issue is usually "available" on direct appeal when its merits can be reviewed without further factual development. *Mills v. United States*, 36 F. 3d 1052, 1055-1056

To prove that he received constitutionally ineffective assistance of counsel, Acosta must show: (1) his lawyer's representation fell below an objective standard of reasonableness, and (2) a reasonable probability exists that but for his lawyer's unprofessional conduct, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 688, 689 (1984). A reviewing court must examine the reasonableness of counsel's performance from counsel's perspective at the time of the alleged error and in light of all the circumstances. Moreover, Acosta shoulders the burden of showing that counsel's performance was unreasonable under the prevailing professional norms and that the challenged action was not sound strategy. *Id.* at 688-689. Courts should avoid second-guessing counsel's performance; instead, the ultimate focus should be on the "fundamental fairness of the proceeding whose result is being challenged." *Id.* at 696.

At the evidentiary hearing, Acosta's trial attorney testified he did not move to suppress Guzman's voice identifications because he thought he would be unsuccessful. Nor did counsel, as he explained, consider retaining an expert in voice identification procedures to challenge Guzman's recognition of Acosta's voice as "Tobacco's." Given the applicable facts and law on this subject, one can understand why defense counsel did not think about doing this. As noted, Acosta challenged Guzman's identification in his direct appeal and lost. He adds

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(11th Cir. 1994). In some instances, ineffective assistance of counsel can be raised in a direct appeal if there is a sufficient record to resolve the claims. *Id.* Acosta's ineffective counsel claims are in this vein.

nothing new in his § 2255, other than posing the issue as an ineffective assistance of counsel claim, and offers no facts showing government agents acted suggestively in either voice identification.[4] Besides, the trial court would have rejected Acosta's attempt to call an expert in voice identification and memory perceptions. *United States v. Smith*, 122 F.3d 1355, 1359 (11th Cir. 1997); *United States v. Benitez*, 741 F.2d 1312 (11th Cir. 1984) (in both cases, the Eleventh Circuit rejected defense efforts to call experts in eyewitness reliability). Acosta has not shown that his trial counsel gave him constitutionally ineffective assistance.

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[4] Voice identification is similar to visual identification. To violate due process, an identification procedure used by the police must be unnecessarily suggestive and create a substantial risk of misidentification. *Neil v. Biggers*, 409 U.S. 188 (1972). The *Biggers* factors for determining reliability include: "the opportunity to view the witness at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." *Id.* at 199. Admittedly show-ups have been condemned, but courts have approved the technique when it is after an immediate confrontation. This allows identification before the suspect has altered his appearance and while the witness' memory is fresh, and permits the quick release of innocent persons. *Johnson v. Dugger*, 817 F.2d 726 (11th Cir. 1987). Therefore, show-ups are not unnecessarily suggestive unless the police aggravate the suggestiveness of the confrontation. *Id.* Furthermore, other facts buttressed Guzman's identification (surveillance with informant, driving a truck that matched the exact description given by "Tobacco," phone records, and the relationship between Acosta and some of the codefendants). *See United States v. Tisdale*, 817 F.2d 1552, 1554 (11th Cir. 1987) (identification reliable as it was consistent with evidence from other sources).

Lastly, Acosta claims his attorney should have objected to this prosecutor's comment in closing argument: "Now the truth, based on this evidence and your common sense, though, means conviction, means guilty verdicts, for all three of these defendants. And the defense attorneys are here and tasked with obscuring that truth and trying to prevent the guilty verdicts from resulting." *See* doc. 113, pp. 8-9. Acosta complained about this on appeal and lost; yet, he brings it back in an altered form. No matter how he frames his issue, it has no merit. Notably, Acosta's current attorney (or government counsel for that matter) never asked Urbano any questions about his failure to object to the prosecutor's tactic. Perhaps, the reason is obvious. In his closing remarks, Urbano skillfully turned the prosecutor's remarks to Acosta's advantage by urging that the prosecutor had intentionally obscured the weaknesses in the government's case. Nonetheless, whether defense counsel purposely did not object or just neglected to do so makes little difference here. Prosecutorial misconduct will require a new trial only if the challenged remarks were improper and prejudiced Acosta's substantive rights. *United States v. Hernandez*, 145 F.3d 1433, 1438 (11th Cir. 1998). A defendant's substantive rights are prejudicially affected when a reasonable probability arises that, but for the remarks, the outcome of the trial would be different. *United States v. Wilson*, 149 F.3d 1298, 1301 (11th Cir. 1998). Moreover, a court must assess any asserted prejudice in the context of the whole trial weighing the comment's probable impact on the jury. *Hernandez* 145 F.3d at 1438. The prosecutor's remarks, even if arguably improper, did not prejudice Acosta's substantive rights.

His trial counsel did not render ineffective assistance by failing to object.

2. *the Brady claim*

At the heart of Acosta's *Brady* claim is his belief that Guzman stole four kilograms of cocaine marked as a government exhibit in an unrelated trial prosecuted in November 1991 involving Guzman. Acosta bases this on a discrepancy between Guzman's testimony as to the amount of cocaine in a government's exhibit (seven kilograms) and that reflected in DEA records and the trial's exhibit list (eleven kilograms). The Defendant also points to the complaint lodged by the DEA with the Tampa Police Department's Internal Affairs Bureau about Guzman's handling of the evidence. More particularly, he asserts that this DEA complaint, and the investigation into the inconsistency, should have been revealed to him as *Brady* information.[5] From all this, the Defendant extrapolates that Guzman either stole the drugs or engaged in governmental misconduct. In any event, he contends the government should have disclosed this information because it would have negatively impacted his credibility and caused the outcome of the trial to be different. The government vigorously denies this and has submitted for my *in camera* examination portions of the

[5] Impeachment evidence that would tend to undermine the credibility of an important government witness falls within the *Brady* rule. *Giglio v. United States*, 405 U.S. 150 (1972). Guzman obviously was an important prosecution witness.

DEA Office of Professional Responsibility file on Guzman.[6]

To establish a *Brady* violation, Acosta must prove: (1) the prosecution possessed evidence favorable to him; (2) he did not possess the evidence nor could he have obtained it himself with any reasonable diligence; (3) the prosecution suppressed this favorable evidence; and, (4) if the evidence had been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. *United States v. Bailey*, 123 F.3d 1381, 1397 (11th Cir. 1997). Against this test, Acosta's claim has no merit.

Despite the inconsistency between DEA's records and Guzman's testimony, the government had no information by April 1992, the date of Acosta's trial, to believe that four kilograms of cocaine was even missing. For example, when Guzman's DEA superiors questioned him, the detective said he believed the trial exhibit contained seven kilograms as opposed to eleven. The nature of DEA's complaint to the Tampa Police Department about

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[6] DEA's complaint followed the arson at DEA's Tampa office in early in January 1992. OPR's investigation revealed that someone entered the office after hours, poured gasoline into a vault's chute, and ignited its contents. OPR conducted an exhaustive investigation, which included interviewing more than 100 DEA and task force employees, cooperating individuals, trafficking suspects, police and fire investigators, and others. Obviously, OPR carefully tracked the contents of the safe trying to solve the crime. Indeed, investigators administered more than 80 polygraph examinations, including testing Guzman twice. He passed both times. By the time of Acosta's trial, OPR had not developed any leads identifying the arsonist.

Guzman also supports the conclusion that the government had no *Brady* information to given Acosta. That complaint focused on Guzman's handling of the exhibit and his adherence to agency rules regarding the custody of controlled substances. On March 30, 1992, the Tampa Police Department's Internal Affairs issued a report to Tampa's chief of police finding DEA's complaint "unfounded" and "unwarranted." Had DEA suspected then that the detective had stolen the drugs, a criminal investigation would have been the next obvious step, not a complaint about disobeying custodial procedures. But even if Guzman had breached agency guidelines and the government knew about it, no *Brady* violation would have occurred because this information would not have changed the trial's outcome given the other evidence against Acosta. *United States v. Caceres*, 440 U.S. 741 (1979) (violation of IRS regulations pertaining to tape recordings did not raise constitutional questions); *United States v. Cross*, 928 F.2d 1030, 1053 (11th Cir. 1991) (reversal for governmental misconduct required only if actions prejudiced the substantial rights of the accused); *United States v. West*, 672 F.2d 796 (10th Cir. 1982) (governmental misconduct is relevant to a criminal trial only if it is so prejudicial that had it not occurred an acquittal would have been the likely result). In summary, the government had no *Brady* material to disclose about Guzman by the time of Acosta's April 1992 trial.[7]

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[7] Two years after Acosta's trial, the government charged Guzman with money laundering stemming from his involvement with drug traffickers in Operation Pro-Mo. Guzman was eventually convicted and sentenced to 11 years imprisonment. After this conviction, and over two years after

*D. Conclusion*

Finding no merit to the Defendant's claims, I recommend that his motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 be DISMISSED.

IT IS SO RECOMMENDED in Tampa, Florida on October 14, 1998.

/s/ Mark A. Pizzo
MARK A. PIZZO
UNITED STATES
MAGISTRATE JUDGE

**NOTICE TO PARTIES**

Failure to file and serve written objections to the proposed findings and recommendations contained in this report within ten (10) days from the date it is served on the parties shall bar an aggrieved party from a *de novo* determination by the District Court of issues covered in the report, and shall bar the party from attacking on appeal factual findings in the report accepted or adopted on appeal by the District Court except upon grounds of plain error or manifest injustice. 28 U.S. C. § 636(b)(1)(C);

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Acosta's trial, Guzman admitted setting fire to the contents of the safe to hide his theft of approximately 400 grams of cocaine from the government's exhibit in the unrelated trial. Guzman made these admissions to government agents under a grant of use immunity. Until Guzman's confession, the government had no significant leads pointing to a suspect despite its exhaustive investigation.

Local Rule 6.02; *Nettles v. Wainwright*, 677 F.2d 404 (5th Cir. 1982) (*en banc*).

cc: Hon. Steven D. Merryday
Counsel of Record

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

| | | |
|---|---|---|
| UNITED STATES OF AMERICA | : | |
| vs. | : | CASE NO. |
| | : | 91-324-Cr-T-10 (A) |
| ANTONIO ACOSTA, a/k/a Tobacco, RAFAEL MENDOZA, MIGUEL ALVAREZ-ROMAN, JORGE RODRIGUEZ, a/k/a El Tio, and MARINA HERNANDEZ, | : | |

**INDICTMENT**

(Filed Nov. 20, 1991)

The Grand Jury charges:

COUNT ONE

From on or about [~~November~~ September /s/ JMS] 1, 1991 through on or about November 18, 1991, in the Middle District of Florida and elsewhere, the defendants,

ANTONIO ACOSTA,
a/k/a Tobacco,
RAFAEL MENDOZA,
MIGUEL ALVAREZ-ROMAN,
JORGE RODRIGUEZ,
a/k/a El Tio, and
MARINA HERNANDEZ,

did knowingly and willfully combine, conspire and agree to possess with intent to distribute five (5) kilograms or more of a mixture or substance containing a detectable amount of cocaine, a Schedule II controlled substance,

contrary to Title 21, United States Code, Section 841(a)(1).

All in violation of Title 21, United States Code, Section 846.

FORFEITURE

From their engagement in the aforementioned violation, the defendants,

ANTONIO ACOSTA,
a/k/a Tobacco,
RAFAEL MENDOZA,
MIGUEL ALVAREZ-ROMAN,
JORGE RODRIGUEZ,
a/k/a El Tio, and
MARINA HERNANDEZ,

shall forfeit to the United States, pursuant to Title 21, United States Code, Section 853, any and all property constituting or derived from any proceeds the said defendants obtained directly or indirectly as a result of the said violation, and any and all of the said defendants' property used or intended to be used in any manner or part to commit and to facilitate the commission of the aforementioned violation.

A TRUE BILL,

/s/ James G. Illegible
FOREMAN

ROBERT W. GENZMAN
United States Attorney

By: /s/ William F. Jung
WILLIAM F. JUNG
Assistant United States Attorney

By: /s/ Walter E. Furr
WALTER E. FURR
Assistant United States Attorney
Chief, Drug Trafficking Section

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ELEVENTH CIRCUIT**

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No. 99-2044-EE

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(Filed Jan. 21, 2000)

ANTONIO ACOSTA,

a.k.a. Tobacco,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA

Respondent-Appellee

---

On Appeal from the United States District Court
for the Middle District of Florida

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**ON PETITION(S) FOR REHEARING AND**
**PETITION(S) FOR REHEARING EN BANC**

(Opinion _____, 11th Cir., 19___, ___ F.2d ___).

Before: BIRCH, DUBINA, and BARKETT, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate

Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Joel F. Dubina
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

| | |
|---|---|
| UNITED STATES OF AMERICA,<br><br>Plaintiff,<br><br>vs.<br><br>ANTONIO ACOSTA, MIGUEL ALVAREZ-ROMAN, and MARINA HERNANDEZ,<br><br>Defendants. | CASE NO.:-<br>91-324-Cr-T-10(A)<br><br>Tampa, Florida<br>April 9, 1992<br>9:05 O'Clock A.M. |

TRANSCRIPT OF TRIAL PROCEEDINGS
JURY INSTRUCTIONS
BEFORE THE HONORABLE WM. TERRELL HODGES
UNITED STATES DISTRICT JUDGE, and a jury.

* * *

[41] A. After talking briefly to Rafael, he told me that he was going to put Tobacco on the phone. He put a man by the name of – by the nickname of Tobacco on the phone. And again I told Tobacco that I was not wanting to go to Miami because of the problem that I had the last time I was there, told Tobacco that I needed some money before I would do anything. Tobacco assured me that he had $600,000 available and persuaded me to come down with the cocaine, 150 kilos. We agreed – I agreed to go down to Miami.

Q. Now, in that conversation did you have any indication who was controlling when the meeting would be or who was more in charge between those two on that phone call?

A. Yes, I did. The voice of authority here clearly was Tobacco.

Q. Now, did you – did you hear Tobacco speak on several telephone calls in this case?

A. Yes, I did.

Q. What was discussed on each of those?

A. It was – the money was discussed and the cocaine transportation fees were discussed.

Q. Did you ever hear Tobacco discuss anything else other than the dealings for the delivery of this cocaine?

A. No.

Q. Did you – during the pendency of the case?

A. No.

[42] Q. After Tobacco was arrested and you were in Sarasota, did you hear him speak, did you hear him say words again on the phone?

A. Yes, I did.

Q. Did you hear that Tobacco speak recently, speak this morning?

A. Yes, I did.

Q. Can you identify this Tobacco?

A. Yes.

Q. Okay.

And where is he?

A. He is the gentleman sitting in the middle of the table and – I can't see what he's wearing because of counsel.

Q. Okay.

A. But he has gray hair, he's wearing a gray suit with it looks to be some brown stripes on his tie, wearing glasses.

Q. Is there any doubt in your mind that that's the Tobacco that prior to his arrest you had these cocaine discussions with?

A. The voice that I heard from this man is the same voice that I talked to on the phone. This is the first time I have saw his face, but it's the same voice.

Q. Now, let me just clarify. After his arrest and when you heard him speak this morning, he did not make any statements concerning cocaine; those were before his arrest. Correct?

[43] A. That's correct.

Q. All right.

Now – okay. That was Thursday. What was your plan and what happened the next day?

A. The following day, on Friday, I went down to Miami. It was about 12:00 p.m. when I arrived at a local shopping center there. I paged Rafael, Rafael Mendoza. A few minutes later he called back. I gave him directions to this shopping center.

* * *

A. A confidential informant was with me.

Q. All right.

Is that unusual in a case?

A. No. It is very common.

Q. Now – all right. What happened there at that shopping center that you had been instructed to come to for the meeting?

A. Well, at that shopping center I met Rafael. Rafael introduced me to Alvarez. He said that Alvarez is Tobacco's brother-in-law.

We – I asked Rafael if they had the money ready. Rafael attempted to convince me to give him a portion of the cocaine and that they would return with the money. And I told them no way, we're not going to do that, I want to have some money in my hands first.

After several minutes of negotiations I suggested [46] that they would take the confidential informant with them so he can see the money and#verify that there is what they say there is as far as money is concerned.

Both Rafael and Alvarez said they would have to call Tobacco to see if they could do that and they would call me back. Then they left.

Q. Okay.

Who did they indicate, then, was.calling the shots?

A. Tobacco, no doubt.

Q. Now, who drove that van – or that white Blazer; do you recall?

A. Yes; Alvarez.

Q. And during this discussion of fronting, was it a discussion with both Rafael Mendoza and Mr. Alvarez?

A. Alvarez only joined in at the end where they talked about having to call Tobacco for that decision.

Q. Okay. Was he present and hearing the prior portion of the negotiations?

A. Yes.

Q. Was there anything in his way that would stop him from hearing these drug negotiations before he participated in them?

A. No. All four of us were standing face-to-face on the sidewalk of a shopping center.

Q. Okay.

[47] Well, after they both informed you they would have to get together with Tobacco on this, what happened?

A. They drove away. And it seemed like an hour later I got a call on my cellular phone. It was Rafael. Rafael said that Tobacco had talked to the people down south – referring to the people in Colombia – and that they would not guarantee any money that was lost if they would give us the money, and therefore the deal was off. And that was the conversation.

Q. Did you tape these calls?

A. No.

Q. All right.

And why was that?

A. Well, I knew that I was going to Miami in an undercover capacity. I was going to be – I couldn't carry a recorder around if I was going to be doing undercover work.

Q. Okay.

And the one previous call you received while you were driving?

A. Yes.

Q. Now, that was the 8th of November; is that correct?

A. That's correct.

Q. All right.

After Rafael told you that Tobacco had talked to the people down there and the deal was off, what happened? A. We returned back. And it wasn't until the 15th of [48] November that I – and it was late in the afternoon, I believe it was 4:00 or after 4:00 that I received a call. I wasn't expecting a call. And I received a call from Tobacco, Mr. Acosta.

Q. What did Mr. Acosta tell you there on the 15th?

A. Mr. Acosta wanted to do the deal. Again I told him there's no way I'm going back to Miami. He said that he would send Rafael up with a hundred thousand dollars to Sarasota. And he asked me if I would give Rafael 30 kilos.

We agreed that if he would show the confidential informant the remainder of the money and when the

confidential informant called me back and told me that he has seen the remainder of the money, then I would give them the rest of the kilos, which would have been the rest of the 150.

Q. All right.

And where was that going to happen?

A. That was going to take place in Sarasota.

Q. Okay.

And where was – when you discussed with Mr. Acosta for him to show the informant the money, did you discuss where that would occur?

A. No, we didn't; but he had the money down in Miami, it would have been done down in Miami.

Q. Now, did – on these phone calls, did you use words like kilos and cocaine?

[49] A. No. The word cocaine is hardly ever said.

Q. All right.

What terms were used, I'd ask you?

A. I believe we were just saying "the things".

Q. Okay.

A. In Spanish would be "cosos" is what we actually used, things.

Q. In your seven years experience and especially undercover, is that a slang word for cocaine?

A. Yes. I have used it many times and I have heard – I have used it because I have heard traffickers use it many times.

Q. All right.

Is that unusual on phone calls with traffickers not to use the words cocaine or kilos?

A. Like I said, I hardly ever hear it, hear the word cocaine or kilos over the phone.

Q. All right.

After Mr. Acosta said he was going to send Mr. Mendoza with the money on that Friday, what happened? What was the plan and what happened the next day? Tell us what you saw and what you know.

A. Acosta put Rafael on the phone and I gave him directions. We agreed to meet at the McDonald's on University Parkway in Sarasota.

[50] Q. Let me interrupt you right there.

Who called you first? Who was it on the phone when you picked up that unexpected call?

A. Acosta.

Q. All right.

All right. Go ahead.

A. Then I gave directions to Rafael. We agreed to meet I believe it was 9:30 in the morning at the McDonald's parking lot. And that was the end of that conversation.

* * *

(Jury in at 10:54 a.m.)

THE COURT: Thank you. Be seated, please, members of the jury.

All right, Mr. Jung. You may proceed.

MR. JUNG: Thank you.

BY MR. JUNG:

Q. Okay, Agent. Sarasota on the 16th.

Now, who suggested that you call Acosta?

A. Both Alvarez and Hernandez.

Q. All right.

And who dialed Acosta's beeper or – just let's hit on that. What happened there?

[58] A. Rafael used my cellular phone to page Acosta.

Q. All right.

And Exhibit 4 is what?

A. Exhibit 4 is a copy of the bill which pertains to the cellular phone that I was using during that investigation.

Q. And did you all – did Rafael and you make several beeps to Mr. Acosta on that day?

A. Yes, we did.

Q. After at least two of those beeps did he return your calls?

A. Yes.

Q. Would your cellular phone bill show on that day, on the 16th, those beeper calls?

A. Yes.

MR. JUNG: Your Honor, I'd hand the witness Government's Exhibit 3 for identification.

BY MR. JUNG:

Q. If you would take a look at that.

Now, back on your cellular phone bill, Detective, what was that number that's showing as you having called it that morning?

A. The number that it shows is area code 305, 397-3648.

Q. Okay.

MR. JUNG: Your Honor, as to Government's Exhibit Number 3, I would seek to read in Stipulation Number 3.

[59] THE COURT: All right.

Stipulation Number 3-of the parties, members of the jury, is to the effect that a custodian of records from Mobile-Com, if called to testify, would authenticate or verify Government's Exhibit Number 3 as a business record of the Mobile-Com Company.

MR. JUNG: I would move to admit Government's Exhibit Number 3.

THE COURT: Do I hear any objection to the exhibit?

MR. URBANO: No, Your Honor.

MS. MAYE: No, Your Honor.

MR. DIAZ: No, Your Honor.

THE COURT: It's received in evidence.

(Government's Exhibit Number 3 was received in evidence.)

BY MR. JUNG:

Q. If you would, Detective, take a look at Government's Exhibit Number 3, the Mobile-Com records, and tell us what they are.

A. Mobile-Com service order for that telephone number that I previously stated, being 397-3648. And it is in the name – or they have a business name of Anacost Tires and Antonio Acosta, address of 18620 Southwest 122nd Avenue in Miami.

Q. Is that beeper documents, Government's Exhibit 3, the records for the beeper number shown on your phone records, [60] Government's Exhibit 4?

A. Yes.

Q. And whose name is on 3 that corresponds with your phone records?

A. Antonio Acosta.

Q. All right.

Now, after that first beep to Mr. Acosta, as shown on those records, what happened there in Sarasota?

A. Acosta was beeped twice. And it was like a minute apart. After beeping him twice, a couple of minutes later Acosta called back and I talked to him.

I explained to Acosta what the changes were. I explained to him that because I had made the trip to Miami the previous week I had taken the cocaine with me and I didn't want to drive it back, therefore I had stored it down in Miami and it is already there.

I asked him if I can keep the 100, that I would relinquish the cocaine down in Miami to him. He agreed to that. And he told me that he would tell Rafael to go ahead and give me the money.

Q. All right.

I'm sorry. Did I interrupt you?

A. He asked for me to put Rafael on the phone, and I did. And Rafael, after getting off the phone, said that Acosta agreed for him to give me the money.

[61] Q. Okay.

And did you beep him again – there's a number of beeps shown on your phone records?

A. Yes.

Q. Now, did you speak with him again that morning after the McDonald's meeting?

A. Yes, I did.

Q. Okay.

And why did you have him called again?

A. I had him paged again because I didn't know what he looked like or what he was driving. And I – when he called back I asked Acosta to give me a description of the car that he would be driving so my people down in Miami would know what he looks like – or what he was driving, rather, so that they can give him the cocaine.

He told me he was driving a white truck with a red stripe and some trash in the back.

Q. Okay.

And did you then communicate that by radio or telephone to Miami?

A. Yes, I did. I called the surveillance agents down in Miami and I gave them this information.

Q. Now, what happened then after Mr. Acosta said he was going to have Rafael give you the money?

A. Rafael walked back to the Buick, conversed with Hernandez [62] and Alvarez for about a minute. Then they – Alvarez I believe was driving the car – I'm not sure – drove the car right behind my car. He got out of the car – Alvarez got out of the car. Mendoza walked to the passenger side of my car.

Alvarez was carrying a gift-wrapped, like a Christmas gift, box. He carried it and placed it in the front passenger seat of my car. Alvarez told me that the money was in there.

After taking the box, then Alvarez and Mendoza – got back in the car and they left the parking lot.

* * *

A. Yes, I did.

Q. All right.

And did you speak with detective or with Special Agent Richard Crawford?

A. Yes, I did.

Q. All right.

Did he place anyone on the telephone who spoke to you on the phone and you heard his voice?

A. Yes.

Q. All right.

And what – what did you hear?

A. I heard the same voice that I had talked to or with on several previous occasions.

Q. And is that – was that Tobacco's voice?

A. Yes.

Q. Was this after he was arrested in time?

A. Yes.

MR. JUNG: If I can have just a moment, Your Honor.

Your Honor, I'll tender this witness for [66] cross-examination.

THE COURT: Mr. Urbano, you wish to inquire?

MR. URBANO: Yes, Your Honor. Thank you.

* * * *

Initially when he first gets on the phone did he [69] indicate that he was given your number and told to call Jimmy?

A. Yes.

Q. Did he also advise you during that conversation about $450,000 that was available?

A. Yes.

Q. And when it came time for the second individual to come onto the phone, it was Mr. Mendoza who said he was putting Tobacco on the phone; is that correct, sir?

A. That's correct.

Q. It was Mr. Mendoza who identified the next person on that phone as Tobacco?

A. That's correct.

Q. You had no idea prior to that what name, if any, this person had or even if there was a second person there; is that correct, sir?

A. That's correct.

Q. Now, you mentioned something about having several conversations with Tobacco. Do you recall that in your direct testimony, sir?

A. Yes.

Q. How many would several be?

A. One on the 7th of November and again on the 15th of November, another call – that's two – and another two on the 16th; four that I can recall. And the last one, fifth, after [70] his arrest.

Q. All right.

So prior to the arrest in this case there were four telephone conversations with an individual who was known to you as Tobacco?

A. Yes.

Q. Let's go to the first one on the 7th. What did Tobacco say to you at that time?

A. On the 7th Tobacco tried to get me to come down to Miami. I explained to Tobacco that I was – I did not want to go to Miami because I had a problem the last time I was down there. Tobacco assured me that he has $600,000 available. After a brief conversation I agreed that I would go down there.

Q. All right.

Now, it took you about approximately 30 seconds to relay that to the jury here. Would you agree with that, sir?

A. Yes.

Q. About how long was the conversation? Was it about the same amount of time as it took you to relay that?

A. No.

I would say it was about three minutes.

Q. Now, sir, you had a meeting with Mr. Acosta here this morning where Mr. Acosta spoke in front of you; is that correct, sir?

A. Yes.

[71] Q. That took place out in the hall this morning, is that correct, prior to court?

A. That's correct.

Q. And Mr. Acosta read something to you?

A. Yes.

Q. In fact, what he read to you were six lines containing three words each and he read that twice to you; is that correct, sir?

A. Yes.

Q. Now, sir, prior to this morning did you ever speak to Mr. Acosta here on the telephone – and I know that your testimony is that you believe it's the same individual who was Tobacco, but I mean did you ever speak to Mr. Acosta on the telephone knowing it was Mr. Acosta as opposed to what your testimony here is today that it seems like the same voice to you?

Do you understand my question?

A. I believe so.

Q. Was there ever a voice identification done where Mr. Acosta was on the phone?

A. Other than what I testified to –

Q. Correct, the one –

A. – when Agent Crawford put him on the phone; no.

Q. Now, sir, I believe you then went on and talked about a second meeting on November 8th; is that correct?

* * *

A. Yes.

Q. Okay.

[77] And you spoke to Tobacco on the phone?

A. Yes.

Q. Now, when you were testifying on direct examination you said that you explained to Mr. Acosta that the cocaine was in Miami. Do you recall that?

A. Yes.

Q. Well, at the time you didn't know that it was Mr. Acosta who was on the phone, did you?

A. No, I didn't.

Q. You only knew a person who was going by the name of Tobacco who was on the phone?

A. That's correct.

Q. And I believe you then indicated that Mr. Mendoza had come back and said that – on direct you said Mr. Acosta agreed to go ahead with the deal. But it really wasn't Acosta that Mendoza said. He said Tobacco agreed; isn't that correct, sir?

A. That's correct.

Q. You didn't find out – or you didn't form the opinion that Mr. Acosta here was Tobacco until after the arrest; is that correct, sir?

A. That's correct.

Q. Now, do you know what time that call came in from Tobacco in response to those pages on November 16th?

A. 10:30, 11:00.

[78] Q. Do you know what time the next call to Tobacco took place?

A. Both calls were just a few minutes apart, I'd say around –

Q. So we're clear on this, let me just back up a little bit.

We're talking about the initial call in response to the beeper on the 16th. That came in about 10:30, 11:00; correct?

A. Yes, probably 11:00ish.

Q. 11:00ish?

A. Yes.

Q. Okay.

And then there's a second call where you want to get a description of the vehicle that Tobacco is driving; is that correct?

A. That's correct.

Q. And was that call placed by you or was that call in response to a beep?

A. It was in response to a beep.

Q. Okay.

And who did the beeping at that point?

A. Rafael Mendoza.

Q. Okay.

Mr. Mendoza beeps a number again and then you get a call back?

[79] A. That's correct.

Q. And it's Tobacco?

A. Yes.

Q. And you speak to him?

A. Yes.

Q. And he tells you that he's driving a – is it a white Ford pickup with a red stripe?

A. A white truck. He didn't specify.

Q. A white truck with a red stripe?

A. With a red stripe and some rubbish in the back.

Q. With some rubbish.

And what time was that call about?

A. 11:00ish something.

Q. Do you know was it like five minutes, ten minutes, 15 minutes after the first call on the 16th?

A. It probably was five minutes after.

MR. URBANO: Okay. I have nothing further. Thank you, Your Honor.

THE COURT: All right.

Mr. Diaz, you wish to inquire?

MR. DIAZ: Yes, please, sir.

* * *

Q. Okay.

Now, is there any doubt in your mind that this man sitting here in the middle is Tobacco?

A. No doubt.

Q. Have you considered – when you say that, have you considered the calls that you had during the pendency of the case?

* * *

[159] truck up to the parking lot.

Q. I'm not asking you who drove the truck up, Agent Crawford. My question is at the time the other individual was arrested he was behind the wheel of the truck, was he not, sir?

A. No. I never said that and I just got finished saying I don't know if he was still in the truck or he may have even been out of the truck. I did not see where he was physically arrested because I was putting Mr. Acosta under arrest.

Q. So your answer is you don't know where the other individual was arrested?

A. Correct.

Q. The other individual, sir, after he was arrested, subsequent to that he was released; correct?

A. Eventually he was released; that is correct.

Q. Now, you put Mr. Acosta on the cellular phone – or, excuse me. Let me start from the beginning.

Mr. Acosta gets arrested; correct, sir?

A. Correct.

Q. You put him on a phone; correct, sir?

A. Back in the – you are talking about back in the DEA office, yes.

Q. All right. I don't know where it happened.

You testified to putting him on a phone with Agent Guzman; correct?

[160] A. Yes, in the DEA office in Miami.

Q. Okay.

This is in the DEA office?

A. Correct.

Q. It's not in one of the DEA cars there in the parking lot?

A. No.

It was in the DEA office when – where we took him to be processed.

Q. What kind of a phone did you put him on? Is it a regular phone or a cellular phone?

A. Regular phone.

Q. How long was Mr. Acosta on the phone with Agent Guzman?

A. Briefly; maybe 30 seconds to a minute.

MR. URBANO: No further questions. Thank you.

THE COURT: Mr. Diaz, you wish to inquire?

MR. DIAZ: Yes, I do, Judge.

CROSS EXAMINATION

BY MR. DIAZ:

Q. Good afternoon, Agent Crawford.

Just so I'm clear, you were involved in some of the surveillances that occurred in Miami in this case; am I correct?

A. That's correct.

Q. All right.

• • •

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

| | |
|---|---|
| UNITED STATES OF AMERICA,<br>Plaintiff,<br>vs.<br>ANTONIO ACOSTA,<br>Defendant. | Case Nos.<br>91-324-CR-T-23A<br>96-262-CIV-T-23A<br>October 5, 1998<br>Tampa, Florida |

TRANSCRIPT OF EVIDENTIARY HEARING
BEFORE THE HONORABLE MARK A. PIZZO,
UNITED STATES MAGISTRATE JUDGE

[11] all the other –

THE COURT: So, the Tampa Police Department file on Mr. Guzman as Defendant's Number 11?

MR. SCHUSTER: Yes, Your Honor.

MR. LAFFERTY: Just for the record – I think the record should reflect, Your Honor, that this composite exhibit actually contains two separate Tampa Police Department Internal Affair files.

It includes File Number 92-10, which was the complaint that DEA made against Javier Guzman, but it also contains a File Number 94-94, which is essentially a file

regarding Javier Guzman which indicates that he was arrested, prosecuted and sentenced for money laundering by the United States.

THE COURT: All right.

MR. SCHUSTER: With those housekeeping matters, Your Honor, I'm prepared to call my first witness.

THE COURT: All right. So there's no confusion about what we're about, Defendant's Number 11 is admitted.

MR. SCHUSTER: Thank you, Your Honor.

And may I also respectfully move for admission of the remaining exhibits, all of which have already been filed with the Court as part of my notice of filing, which basically provides the schematic – in this district, under the Local Rules, as I understand it, I was supposed to file

• • •

[14] A. Agent Guzman, yes, he was.

Q. And why was he important?

A. He was the agent who supplied the identification of the voice on the tape which was key to the case.

Q. Voice on the tape?

A. I'm sorry. Not on the tape; the voice on the phone.

Q. Now, prior to trial did you receive what is commonly referred to as Brady, Eggers or Giglio disclosures from the Government about Guzman?

A. Well, I received discovery, but there wasn't anything of a Brady nature in the discovery about Guzman, no.

Q. Had you known at the time that you tried this case that the Office of Professional Responsibility of DEA had filed a formal complaint with Internal Affairs of the Tampa Police Department suspecting that Guzman may have set a fire at the DEA locker, would that have assisted your efforts to impeach his testimony?

THE COURT: Mr. Schuster, there's no evidence nor is there any information suggested in the complaint that Mr. Guzman had done anything of the sort.

MR. SCHUSTER: May I rephrase, Your Honor?

BY MR. SCHUSTER:

Q. If you had known that the Office of Professional Responsibility of the DEA had lodged some type of complaint with the Tampa Police Department against Mr. Guzman, would

* * *

[18] Q. I was asking you if that would have assisted your ability in impeaching Mr. Guzman.

A. I would have tried to have used it, if not in cross examination, maybe on direct examination to show a bias, interest or motive on his part maybe to curry favor with the Government because of the investigation, something like that, sure.

Q. Now, Mr. Urbano, just before Court today, I provided you with a copy of a letter – memo dated 5 September 1989 which is referred to in the petitioner's exhibit list as Exhibit 1. Do you recall reading that exhibit?

A. What was that exhibit in reference to?

Q. It pertained to a letter of counseling to Guzman with respect to the execution and investigation of a house involved in narcotic trafficking.

A. Yes, I remember that.

Q. Okay. Prior to the trial in this case, did you receive any evidence or information from the Government that Guzman had effectuated a search or a stake-out at the wrong address?

A. No, I did not.

Q. Would evidence that Guzman had effectuated a search or staked out the wrong house that was the subject of an investigation, misidentified the house, would that have helped you at trial?

[19] A. Yes.

Q. And why was that?

THE COURT: Mr. Schuster, Exhibit Number 1, which has already been admitted by stipulation – that was one of the documents that you had referred to, right, that it's – that comes from the TPD file?

MR. SCHUSTER: Yes, Your Honor.

THE COURT: – does that residence have anything to do with this particular case?

MR. SCHUSTER: It goes to – yes, Your Honor, it does, because –

THE COURT: Is the residence associated with this case?

MR. SCHUSTER: No. No, Your Honor; only in the context of it's a disciplinary action for a misidentification.

THE COURT: How would that be admissible at a trial?

MR. SCHUSTER: Your Honor, in the same way that, under Rule 404(b), a defendant often has to labor under the opprobrium and prejudice resulting from similar act behavior, this officer would be subject to the same application of Rule 404(b) but in a defensive posture.

THE COURT: Do you have any case law to support you on this?

[20] MR. SCHUSTER: Yes, Your Honor, there's all kinds of case law. No, I did not bring it with me, but I would be glad to brief that issue to the Court subsequent to the hearing, why exactly this memorandum would have been admissible in the context of the Acosta prosecution and the theories under which it would have been admitted.

THE COURT: All right.

BY MR. SCHUSTER:

Q. I was asking you why that may have helped you at trial.

A. I would try and get it into evidence before the jury to show a lack of competence in his profession as an agent.

I would also try and tie it in to a misidentification of the voice as well, even though we're dealing with a house and not a voice; but just general overall competence as an agent I think would be in question, if I could get it into evidence.

Q. So, the – you would try and parallel it with respect to his identification of the Acosta voice and his identification of a house?

A. Well, you're asking me as a defense attorney what I would do. I'm telling you what my strategy would be. Yeah, I would try and do that. I would try and get that into evidence and try and argue that to the jury. That's my personal strategy as to what I would do there.

* * *

[63] Q. You were an Assistant United States Attorney during – in the Middle District of Florida during the time period of November 1991 at least through April of '92?

A. That's correct.

Q. And you were charged with the responsibility of prosecuting the case known as United States v. Acosta, were you not?

A. Yes, sir.

Q. And did you know before the Acosta trial that OPR of DEA had filed a complaint with the Tampa Police Department Internal Affairs Office?

A. I don't believe that I did. You mentioned that to me when we talked on the phone, and I think that was news to me. I sure don't have any recollection of knowing that.

Q. Now, I know it's hard to say what you would have done; but had you known that there was some type of complaint filed by that entity, would you have disclosed that to the Court or defense counsel?

A. Okay. If there was a complaint filed against Guzman that bore on his veracity, I would hope that I would have – and I would like to say I would have – done something with it, either taken it to a supervisor for review or offered the matter in camera to a judge.

As I said, I don't have any recollection of being aware of that, and I don't know what the law is. I would [64] have hoped I would have at least looked up what the law was on pending I.A. complaints against police officers.

Q. Okay. We did speak about this Friday briefly, did we not?

A. We did, yes.

Q. And am I paraphrasing you correctly that you felt that such a complaint would have been a material factor impacting the credibility of an important Government witness and, therefore, you would have had a duty to turn it over at least to the Court?

A. I think that that's a fair statement of the law. Now, I may be wrong, and there's probably cases on what a pending I.A. complaint – what the duty is; but I would hope that that's what the law would be.

Q. With respect to your position in the United States Attorney's Office during that time period – and I know this is going back a while – were you aware, generally speaking, of an OPR investigation concerning an arson investigation at a DEA evidence locker?

A. At some time I was. I think everybody was in the U.S. Attorney's Office.

Q. Okay.

A. I don't know when I was, but the answer is yes, at some time.

Q. And that would have been contemporaneous with that [65] particular investigation?

A. Well, yeah. Probably. I don't – my recollection is that someone put some accelerant in the evidence room and caused a fire, and I recollect that there was a lot of soot around from –

Q. We don't need the details of what happened.

A. Okay. So, I think the answer is yes, probably after the fire, but not probably – probably not way after the fire.

Q. The Government has taken the position – and I'm sure they will correct me if I'm wrong – that all DEA agents in the Middle District of Florida were suspects with respect to that incident. Was that your general understanding as well?

A. Oh, I think that there were – I don't want to use the word "suspects," but I think everybody was under investigation because probably everybody had a key to

that office. Okay? So, I guess my answer to you is: There was an investigation going on, and I'm not aware of anyone who – except someone who might have been on vacation for three weeks who was excluded.

Q. Now, this was commonly known in law enforcement circles in the Middle District of Florida?

A. No. I believe that it was known after the fire that there was a problem with the fire among – it was known [66] among the narcotics prosecutors, and I don't know how far afterwards.

Q. Was the fact that – well, was Agent Guzman amongst those agents that was under, as you describe it, investigation at that time period?

A. Well, Mr. Schuster, I never suspected there was anything wrong with Javier Guzman until after I left the U.S. Attorney's and he got in trouble. Okay?

Now, to the extent that he was one of the people working with DEA and they were all under – no one was excused from suspicion; I guess the answer is yes. But I never heard or suspected that Willie Guzman had anything to do with that fire.

Q. Did you disclose to defense counsel anything at all pertinent to this OPR arson-related investigation?

A. Well, I'm not sure I knew it was OPR. I knew they were looking into what happened with this fire. I don't recall disclosing anything related to the DEA fire to defense counsel in the Acosta case. Now, if I did – well, I'm sure I didn't. But if I did, it would be in the file. There would be a correspondence of some sort.

THE COURT: Mr. Schuster, are you saying that just because there was a fire, that a prosecutor would have an obligation to notify defense counsel in any case being

* * *

[70] post-arrest telephone call?

A. Mr. Schuster, I don't remember the case that detailed; but plainly I felt that we needed or would like to have this voice I.D.

Q. So, you asked the Judge for the out-of-court hallway I.D.?

A. I don't – I'm sure I did with the motion.

Q. Okay. Do you recall any defense objection to that single-person voice show-up identification procedure?

A. I don't, but I wouldn't say that's a certainty until you looked at the trial transcript and the court file. I don't know whether Mr. Urbano objected on the record. It would be in the transcript if he did.

Q. But you have no independent recollection of –

A. I have no independent recollection of that.

Q. You're now a defense attorney?

A. That's correct.

Q. As a defense attorney, do you believe that it is unduly suggestive to present a single voice to a law enforcement officer as a basis for a voice identification?

A. Mr. Schuster, I don't know the law on that. Now, let me – I'm not trying to be hard on you. Would I have

objected as a defense lawyer now? Would I hope to? Yes. Would I have squawked? Yes.

Would Judge Hodges, especially that being his last

* * *

January 14, 1992

TO: T. A. DEPOLIS
A/Chief of Police

FROM: M. A. WILLIAMS, Captain Internal Affairs Bureau

SUBJ: Complaint Involving Detective J. Guzman, Tactical Division, I.A.B. Case #92-10

Sir:

On November 12, 1991, Det. Guzman removed eleven kilos of cocaine from the DEA vault and transported it with Agent Robert Davis to Federal court. U. S. Attorney Jim Preston had pre-trial and noted the eleven kilos. During the court case, Det. Guzman had control of the evidence and testified that the exhibit had seven kilos of cocain in it and not eleven. As of December 31, 1991, the four kilos of cocaine have not been accounted for by Det. Guzman or Agent Davis.

Respectfully submitted,

/s/ Illegible
for: M. A. WILLIAMS, Captain
Internal Affairs Bureau

MAW:mlb

cc: Major W. A. Sawyer

**TAMPA POLICE DEPARTMENT**
**Internal Affairs Bureau**

**COMPLAINANT: Drug Enforcement Admin. I.A.B.**
**CASE: 92-10**
**INTERVIEW: January 15, 1992**

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**Informational Supplement**

On January 14, 1992 this investigator met with Senior Inspector Paul Teresi and Inspector John Brown of the Miami D.E.A. Officer of Professional Responsibility at the D.E.A. office, 5624 Bay Center Drive. Also at this meeting were Agent Pat Dolman and Agent George Finney with A.T.F., Detectives Paul Rockhill and Detective George McNamara with the Tampa Police Department and Fire Investigator Todd Spears with the Tampa Fire Marshals Office.

The purpose of this meeting was to update this investigator on the investigation of arson in the D.E.A. vault and explosion. S/I Paul Teresi advised that during their investigation they found a possible discrepancy in the amount of cocaine involving a government case and four missing kilos of cocaine. Detective J. W. Guzman was the Task Force case agent.

On November 7, 1991 Agent Robert Davis went to Miami and picked up eleven kilos of cocaine from their lab. This was part of a 325 kilo seizure. Agent Davis placed the evidence in a secure locker in Miami.

On November 8, 1991 Agent Davis transported the sealed box to Tampa, D.E.A. office. Agent Davis placed the evidence in SAC Mike Powers safe.

On November 12, 1991 Agent Davis and Detective Guzman transported the evidence to the U.S. Federal Court house for trial. U.S. Attorney Jim Preston noted in his exhibits that this box contained eleven kilos of cocaine and the court case began.

On November 13, 1991 Detective Guzman testified when identifying the exhibit that it contained seven kilos of cocaine.

On November 14, 1991 the evidence was logged back into the D.E.A. vault. The trial was a mistrial.

It should also be noted that they (DEA) did not know the status of the cocaine during the nights of November 12th and 13th, while in the custody of Detective Guzman.

On December 10, 1991 a new trial begins and the Judge only wanted two kilos of cocaine in the courtroom, due to the smell. Agent Davis and Detective Guzman sealed the two kilos and transported it to court.

On December 12, 1991 Detective Guzman returns the two kilos and gives them to Agent Davis, who places them in SAC Power's safe.

Approximately two weeks later SAC Mike Powers finds the two kilos still in his safe and has either Agent Davis or Detective Guzman remove them and place them in the vault.

Their DEA case number G6-91X020 was assigned and the chemist in Miami was interviewed and documents show there were eleven kilos of cocaine in the box when Agent Davis picked up the package on November 7, 1991.

It should be noted that Agent Davis elected to submit to a polygraph examination and took it on this date and passed.

At this point this investigator was asked as to the departments procedures in conducting an interview with Detective Guzman. This investigator advised Senior Inspector Teresi of the policy involving subject officers rights under the current bargaining unit guidelines. It was explained that from the information obtained at this point in their investigation and after reading the statement of Agent Robert Davis that Detective Guzman would have to be treated as a "subject officer" and provide him with proper notification and representation if requested. This investigator also inform S/I Teresi that a polygraph could be requested after the interview if the chief of police so requested and that the "subject officer" would be able to pick his examiner.

S/I Teresi advised that agents with DEA can voluntarily submit to a polygraph examination, however they could not be compelled to take one.

This investigator then advised Acting Chief T. A. DePolis of this investigation and agreed that Detective Guzman should be treated as a "subject officer" and be afforded all due process rights under our contract.

This investigator then opened this case and utilized DEA Office of Professional Responsibility as the complainant and used the statement received on Agent Robert Davis as a witness statement. Detective Guzman was notified of the investigation by coming to the IAB office and picking up his notice on January 15, 1992.

It was recommended that the court stenographer be contacted to hear the back up tapes from the testimony given by Detective Guzman on November 13, 1991 as "seven" and "eleven" sound alike. S/I Teresi advised that they would.

Senior Inspector Teresi provided this investigator with a copy of Agent Davis's statement, a copy of the court transcription, a deputization authorization on Detective Guzman and a list of exhibits from the federal trial, which are part of this case file.

/s/ Sgt. R. E. Pennington
R. E. PENNINGTON, Sergeant
Internal Affairs Bureau

rep

Statement of Robert E. Davis as given to DEA Inspectors John Brown and Paul Teresi on January ~~13~~, [14th /s/ RED] 1992 at Tampa District Office.

I left the Tampa District Office of the Drug Enforcement Administration on Friday, Jan. 3, 1992, at approximately 6:30 P.M. I did not return to said building, located at 5426 Bay Center Drive, Tampa, Florida, until Monday, Jan. 6, 1992.

On Thursday, Nov. 7, 1991, I was at the DEA's Southeast Regional Laboratory in Miami, Florida. I picked up and signed for Exhibit 4 under DEA case number G6-91-X020. The exhibit had been analyzed and assigned laboratory number 67464. My purpose for signing out this drug exchibit was to transport same to Tampa, Floirda where it was to be used in a criminal trial.

After picking up the exhibit which was sealed in a corrugated container, I carried it [it /s/ RED] to the DEA Miami Field Division Office. I secured the exhibit in a locked cabinet at the Field Division Office because I had several other assignments to complete before returning to Tampa.

I believe I departed Miami, Florida on the following evening, Nov. 8, 1991, after I picked up the exhibit from the cabinet at the Miami .ield Division. I returned to Tampa and was unable to contact anyone who had access to the temporary drug storage vault we have at the Tampa District Office. I decided to lock the exhibit in a safe in ASAC Michael Powers' office. Mr. Powers had given me the combination to the safe a long time ago and I have used it numerous times under similar conditions.

The box containing Exhibit 4 was to large to fit in the top drawer of the safe. I opened the box and removed all the heat sealed evidence envelopes, kilogram size bricks, and empty plastic tape wrappings that had been contained in box. I put all of these items in the safe and locked it. I put the empty container in my locker.

To the best of my recollection I opened Mr. Powers' safe the following Monday and put all the drug exhibits back in the original container. I then believe it was placed by Mr. Powers in the temporary drug storage vault at the Tampa District Office.

On November 12, 1991, I gave all the items contained in Exhibit 4 to Task Force Agent Javier Guzman. I had TFA Guzman sign a receipt for these items and notice on the receipt that I had opened the box for inspection. I believe that same day Guzman and I took the box to the office of Assistant United States Attorney James Preston. Mr. Preston was prosecuting the case in which the evidence was to be used and I am positive that we inspected the evidence at Preston's office at which time all items in Exhibit 4 were still in the original container.

I don't think that I saw Exhibit 4 in this case again until approximately the third day of trial (U.S. VS. CARLOS VICARIA). I believed I testified in the trial that day and after testifying Agent Guzman asked me to sit with the drugs in the courtroom while he went to eat lunch. The trial ended in a hung jury. I later talked to TFA Guzman and suggested we just leave Exhibit 4 in the vault at Tampa District Office because Mr. Preston wanted to prosecute Vicaria again on the December, 1991, docket.

The week of December 9, 1991, Carlos Vicaria was tried again. Agent Guzman asked me if it would be allowable to use only two (2) of the packages from Exhibit 4 at second trial. Agent Guzman stated that James Preston and Agent Guzman only wanted to used two (2) packages because the odors from the entire exhibit were strong and obnoxious. I believe I recall seeing Agent Guzman later that same day sealing the packages in other evidence envelopes to deter the odors. I did not assist Agent Guzman in this process or enter the vault to extract the packages from original container.

Carlos Vicaria was convicted at his second trial. I recall Agent Guzman bringing the two packages from Exhibit 4 back to our office after the trial. I believe I opened Mr. Powers' safe and allowed him to lock the two packages up because nobody was available to open the vault. Agent Powers later told me he ahd taken the packages out of his safe and returned them to the drug storage vault.

I had no further discussion concerning Exhibit 4 with anyone until Monday, Jan. 6, 1992. On that day I came to the Tampa District Office and saw the damage that someone had done to the drug vault by reportedly setting fire to it. I then went to Agent Powers and asked him if the Exhibit 4 from G6-91-X020 had been in the vault. I recall ASAC Powers stating that he believed it had been in there. ASAC POWERS asked me how many kilograms of cocaine were stored in the container. Without going to check the file I told ASAC Powers I thought there were seven (7) kilograms. I recall making the same statements to Inspectors Brown and Teresi when I was interviewed by them later that afternoon. I told then seven because I

specifically recall five (5) kilogram size bricks being in the original container along with two (2) empty plastic tape wrappers, and at least two (2) heat sealed evidence envelopes.

On Monday, Jan. 13, 1992, I was again interviewed by DEA Inspectors Brown and Teresi. They asked that I provide this statement in accordance with DEA administrative requirements. They also asked if I would voluntarily submit to a polygraph examination which was not [RSC] mandatory under current DEA guidelines. I told Inspectors Brown and Teresi that I would be willing to take the polygraph examination.

/s/ Robert E. Davis
ROBERT E. DAVIS 1/11/92

SUBSCRIBED AND SWORN TO BEFORE US ON THIS ~~13~~14th RGC DATE OF JANUARY, 1991.

/s/ John B. Brown 1/14/92
John Brown

/s/ Paul A. Teresi
Paul Teresi 1/14/92

March 30, 1992

TO: G. [Chief Deputy Please illegible into E.] GONZALEZ
Chief of Police [Illegible /s/ EZ]

ATTN: T.A. DePOLIS, Deputy Chief
Investigative Services
[I CONCUR WITH THE RECOMMENDED DISPOSITION. /s/ TAD 4/3/92]

W.A. SAWYER, Major
Tactical Division
/s/ WAS concur with unfounded/ unwarranted]

FROM: D.N. MORRILL, Lieutenant
Vice Control Bureau

SUBJECT: Complaint Against Detective J. Guzman
IAB Case #92-10

Sir:

On January 14, 1992, D.E.A. Office of Professional-Responsibility lodged a complaint against Detective J. Guzman. The complaint was based on the information that Detective Guzman on November 12, 1991, removed eleven kilos of cocaine from the D.E.A. vault and transported it with Agent Robert Davis to Federal Court. U.S. Attorney, Jim Preston, had pre-trial and noted the eleven kilos. During the court case, Detective Guzman had control of the evidence and testified that the Exhibit had seven kilos of cocaine in it not eleven.

As of December 31, 1991, the four kilos of cocaine had not been accounted for by Detective Guzman or Agent Davis.

The specific complaint regarding Detective J. Guzman is Conformance to Laws and Failure to Comply with Departmental and D.E.A. Policy.

Agent Robert Davis provided a written statement regarding the handling of the cocaine. Detective Guzman was interviewed as part of the investigation.

The following is a chronological summary of the incident based on their interviews and the subsequent investigation of the incident.

November 7, 1991, Agent Davis went to Miami and picked up Exhibit 4 from the laboratory. (Exhibit 4 is documented in a Miami lab form as 11 kilos of cocaine).

November 8, 1991, Agent Davis transported the sealed box to the Tampa D.E.A. Office. He unsealed the box and placed the kilos in Mike Powers safe. He placed the empty box in his locker because the safe was not large enough to hold the box and contents.

Agent Davis believes he possibly opened Mike Powers safe the following Monday and placed the kilos back in the original container. He then believes Mike Powers placed the box in the drug storage vault at the D.E.A. office.

November 12, 1991, Agent Davis, while at the D.E.A. Office, gave Detective Guzman Exhibit 4. Detective Guzman signed the receipt for one box and Agent Davis noted on the original receipt that he had opened the box for inspection.

Agent Davis and Detective Guzman then transported the evidence to the U.S. Federal Courthouse for trial. U.S.

Attorney, Jim Preston, noted in his exhibits that this box contained 11 kilos.

Detective Guzman returned the evidence to Mike Powers safe in the D.E.A. Office after court. He had to remove the kilos from the box to place them in the safe due to limited storage space.

November 13, 1991, Detective Guzman picked up the evidence from the safe, placed it in the box and transported it to Federal Court.

On this date, Detective Guzman testified when identifying the Exhibit that it contained seven kilos of cocaine. According to Detective Guzman's interview he believed there were seven kilos because he remembers seeing "7 K's" written on the box. After trial he locked the evidence in Mike Powers safe.

November 14, 1991, there was a mistrial in the case and Detective Guzman gave the evidence (one opened box containing cocaine) to Agent George Spaulding (D.E.A. Supervisor). Agent Spaulding opened the drug storage vault and placed the evidence inside. Detective Guzman assumed Agent Spaulding logged the evidence in and completed the required documentation.

December 10, 1991, Detective Guzman removed two kilos from the Exhibit that was in the vault and responded to the new case trial. After trial he returned the two kilos, possibly to Agent Crawford, who placed the evidence in the D.E.A. vault.

December 11, 1991, Detective Guzman returned to the vault, picked up the two kilos and responded to trial with the evidence.

At the conclusion of the trial, Detective Guzman returned to the D.E.A. Office and gave the two kilos to Agent Davis. Agent Davis placed the two kilos in Mike Powers safe.

Detective Guzman had a conversation with Agent Davis and Agent Davis advised he would send the evidence back to the laboratory.

Detective Guzman advised about two weeks after the trial that Mike Powers beeped him and asked what the two kilos were doing in the safe. Detective Guzman told him that agent Davis must have forgotten about the evidence and then offered to take care of the evidence. Mike Powers said he would have George take care of it.

Agent Powers later told Agent Davis that he had taken the packages out of the safe and returned them to the drug storage vault.

December 27, 1991, Detective Guzman observed the drug storage vault open while several agents were placing a seizure of marijuana in there. Detective Guzman observed the box containing the evidence still in the vault with the box open and two kilos on the top. He placed the two kilos in the box and then sealed the box with tape.

On January 3, 1992, according to the D.E.A. investigation, someone entered the D.E.A. Office and apparently poured a quantity of gasoline into the vault where the drug evidence was stored. The gasoline was ignited. The resulting fire destroyed a quantity of cocaine that was stored, along with other drug evidence in the room. A

portion of the cocaine was not destroyed and was submitted to the lab for analysis. The resulting analysis determined that the "cocaine" was primarily baking soda.

Detective Guzman has been assigned to the D.E.A. Task Force since January 15, 1991. In this case he was given the evidence to respond to Federal Court with Agent Davis. Throughout the entire trial, he picked up the evidence at the D.E.A. Office from a D.E.A. Agent. He returned the evidence to the D.E.A. Office daily and gave it to a D.E.A. Agent or Supervisor to return it to the safe or vault.

The D.E.A. vault and safe are accessible to D.E.A. supervisors and other employees daily when removing, returning and viewing evidence. Therefore, it is impossible to ascertain which employees had access to the evidence.

The laboratory findings from the sample that was submitted after the fire were not conclusively linked to the evidence that Detective Guzman had D.E.A. store in the safe and the vault.

Detective Guzman submitted to a polygraph test January 15, 1992. The examiner determined the results were inconclusive in the first test and truthful responses in the second and third series.

The laboratory report reflects 11 kilos of cocaine were in Exhibit 4. Detective Guzman testified seven "K's" were in the Exhibit due to him observing that amount written on the box, while in court. Agent Davis, in his written statement, also stated he thought there were seven kilos in the exhibit and made that statement to him supervisor, Mike Powers and the Inspectors.

The fire in the D.E.A. vault on January 3, 1992, destroyed an undetermined amount of evidence. The D.E.A. investigation did not determine the exact quantity of cocaine that was in the vault before the fire and exactly which evidence and the amount of evidence that was destroyed as a result of the fire.

The complaint of Conformance to Laws and Failure to Comply with Departmental and D.E.A. Policy, against Detective J. Guzman are both **UNFOUNDED/UNWARRANTED**. The complaint lodged by D.E.A. was made in good faith without malicious intent. However, the investigation disclosed that the allegations lack basis in fact.

During the investigation, even though there was no proof Detective Guzman violated any laws or failed to comply with policies, it was recognized that D.E.A. is lax in their operation procedures regarding the handling of evidence.

Detective Guzman was counseled in a constructive training session regarding, proper handling of evidence. He was also instructed to obtain training manuals from D.E.A. and to notify his supervisor if he has concerns regarding any instructions or procedures.

Respectfully submitted,

/s/ Lieutenant D.N. Morrill
D.N. MORRILL, Lieutenant
Vice Control Bureau

DNM/vsa

May 5, 1992

TO: W.A. SAWYER, Major
Tactical Division

ATTN: D.N. MORRILL, Lieutenant /s/ Lt Morrill
Vice Control Bureau

FROM: M.C. GEORGE, Sergeant
Vice Control Bureau

SUBJ: Detective Guzman's Failure
to Report for Duty

Sir:

On May 1, 1992, at approximately 1140 hours, I was contacted by Lt. Morrill and advised that the Division was on stand-by and not to report for duty at 1300 hours as scheduled.

Shortly thereafter I was notified to have Squad 120 report to the Tactical Division office at 1830 hours on May 1, 1992.

At approximately 1245 hours I called the Drug Enforcement Administration Office to advise Detective Guzman to report for duty at 1830 hours but I was advised he wasn't in. I paged Detective Guzman two (2) times and put my home phone number in. I never received a response.

At approximately 1320 hours I called Special Agent Spaulding at the D.E.A. Office in an attempt to contact Detective Guzman. Special Agent Spaulding advised that he thought Detective Guzman was at lunch.

I again paged Detective Guzman and he called me at approximately 1340 hours. I advised Detective Guzman

that the entire Division was being called in this evening (May 1, 1992). I instructed Detective Guzman to report for duty at the Tactical Office at 1830 hours. Detective Guzman and I discussed the current money laundering investigation and possibly of a money pick up in Miami, Friday night but it appeared the pick up would not occur until the week of May 4. I advised Detective Guzman to report to work at 1830 hours and if any charges occurred in the money investigation to contact me.

I then contacted D.E.A. Agent in charge, Mike Powers, and advised him that Detective Guzman was being called in at 1830 hours and Special Agent Powers concurred.

Roll Call was held at the Tactical Division at 1830 hours and Detective Guzman was not present. Sergeant Orrill paged Detective Guzman but Detective Guzman did not respond. Sergeant Orrill then called Detective Guzman's residence and a female, presumably his fiance, advised that she had not seen him in several hours.

I paged Detective Guzman twice at approximately 2000 hours using Sergeant Orrill's car phone number and again at 2040 hours using my pager number at the call back numbers and did not receive a response from Detective Guzman.

I called Detective Guzman's residence shortly thereafter and left a message on his answering machine to contact me as soon as possible either by my pager or at my home. Detective Guzman did not contact me on the evening of May 1, 1992.

On May 2, 1992, at approximately 1230 hours, Detective Guzman contacted me at my residence. Detective Guzman apologized for not coming to work but stated he had just lost everything. He stated that he was in a state of depression but he didn't really know why. He stated that he thought it may be related to the investigation of the Drug Enforcement Administration Office fire and the possibility of missing cocaine from the vault in which he stated he was a suspect in. He stated this was causing a lot of stress.

Detective Guzman stated that he felt he didn't get any support from the Department and with his excellent record, he shouldn't have been subjected to this investigation.

Detective Guzman advised that he couldn't function and drove to St. Petersburg Beach and walked to the water and just thought. He stated he felt very explosive.

I told Detective Guzman that the rest of the Unit was also being called in at 1830 hours tonight (May 2, 1992) but I was releasing him from the assignment and for him to meet me at the Tactical Office at 1100 hours, Monday, May 4, 1992. Detective Guzman advised that was fine. I advised Detective Guzman that if he needed anything during the weekend to call me or page me. He advised he would.

Respectfully submitted,

/s/ Sgt. M.C. George
M.C. GEORGE, Sergeant
Vice Control Bureau
MCG/vsa

May 6, 1992

TO: W. A. SAWYER, Major /s/ WB
Tactical Division

ATTN: D.N. MORRILL, Lieutenant /s/ Lt Merrill
Tactical Division

ATTN: M. GEORGE, Sergeant /s/ Sgt. M. George
Tactical Division

FROM: J. GUZMAN, Detective
Tactical Division

SUBJECT: INCIDENT ON MAY 1, 1992

Sir:

On Friday, May 1, 1992, at approximately 2:00 p.m., I was advised by Sergeant M. George to report to the Vice office at 6:00 p.m. reference to being on stand-by for anticipated disturbance as a result of the Rodney King verdict. I failed to report or to call on that day.

I was overwhelmed by stress and anxiety to the point it affected my decision and the very poor judgment that followed.

Although I understand that my failure to report or call was totally irresponsible and obviously out of character, I would like to mention certain events that caused a great deal of stress and ultimately affected or caused my temporary irresponsible behavior.

As you know Doug Schultz was arrested shortly after his dismissal from the D.E.A. Task Force. A very short time later, in the early part of January, the evidence vault at D.E.A. was fire bombed. Some of the cocaine which was destroyed in the fire pertained to a case that I had just completed. This was brought to my attention along with

the cold shoulders that followed. For the first time in my life I felt like a suspect. I was not alone. D.E.A. agent Robert Davis was also considered a "suspect". After 7 years of dedication to my department and making many friends, I felt alone. I volunteered to take a polygraph and waived all PBA rights and subsequently passed the polygraph.

During this investigation I endured incredible stress which affected my health to the point I had to see a medical doctor. Shortly after taking and passing the polygraph I was served with a notice advising me that I was a subject of an internal affairs investigation. This certainly added a great amount of stress on top of what I was already going through. For the very first time in my career I began feeling bitter for my department. I felt that being considered a suspect in such a serious crime would get out and ultimately tarnish the reputation that I had worked so hard for.

The investigation move on but I had sustained an injury that would later be aggravated by minor incidents that normally would not have annoyed me. The emotional injury was analogous to hitting your thumb with a hammer and feeling pain every time you bump it until it heals.

I started the healing process by getting back to work. During this period I was culminating an investigation which led to a record seizure of cocaine and beginning an international money laundering investigation with DEA.

One day during this phase I was called to Sgt. George's office. There were several Detectives from the squad there. Sgt. George advised me to take the next two days

off because I had to fill in as a monitor on a Spanish speaking wire tap on Friday and Saturday night. I had two upcoming trials and I was asked by an Assistant State Attorney to come to her office on Thursday to prepare for trial. I was also involved in the beginning stage of a money laundering investigation targeting one of the most powerful cartels in Columbia. Because we were not alone, I told Sgt. George that I needed to talk with him because I "have a problem with that" (taking time off to work Friday and Saturday night). Immediately Sgt. George jumped up and in a loud tone of voice said to the other Detectives, "everybody out". I was shocked in detecting anger from Sgt. George. My intentions were to explain the problems it would cause for me to have to adjust my schedule on such short notice. The conversation was tense and initiated the flow on an undercurrent of hostility between me and my supervisor. This was a feeling that I have never experienced. To aggravate the situation, I learned that I was filling in for another Detective who claimed he could not work those hours (Friday – Saturday 1700-0130) because he had administrative paper work to do. This was a bump to that sore thumb. Supervision was tightened but, I understood the concern of my supervisors after the Schultz incident.

On Thursday, April 30, 1992, I was presented with an award for Officer of the year by Hillsborough County Bar Association. After being advised that the Chief, Deputy Chief or the Major were unable to accept the award for me, I requested my former supervisor, Sgt J.D. Thompson to accept it for me (I was unable to accept it because of my undercover role). Sgt. George was present during the ceremony and afterwards requested me to come and see

him. During the subsequent meeting, Sgt. George congratulated me but also admonished me for not letting him know that Sgt. Thompson would be accepting my award. I told Sgt. George that it was nothing personal. I thought Sgt. Thompson would be my best choice since he was the one who recommended me for the award and participated in the investigation. I also told Sgt. George that my understanding was that the Chief, Deputy Chief or Major were not available to attend. This conversation was tense and yet another bump on that sore thumb.

The following day, Friday, May 1, 1992, I had been very busy. I had received several calls from Columbia and was advised that a woman would be calling me from Miami to arrange the pick up of $500,000 that evening or the following morning. At approximately 2:00 p.m., I talked with Sgt. George and he was aware of the anticipated trip to Miami, however, he advised me that I had to report to the Vice office at 6:00 p.m. for the anticipated disturbance. In the midst of such a high level investigation with a potential of generating over 30 million dollars per month and a percentage going to my department, this request given without any hope of flexibility, totally overwhelmed me. The months of harboring hostility, resentment and stress caught up with me. The potential of missing the call and not being able to put together the pick up of $500,000 at a time so crucial to the investigation created a tremendous amount of stress. I felt that my supervisors undermined the investigation that I and others had put so much work into and would ultimately greatly financially benefit my department.

My intentions were to take a drive to a park and walk to relieve my stress and return to the Vice office at 6:00 p.m.

However, I lost track of time due to the stress and anxiety that I was feeling. At about 7:30 p.m. I realized how late it had gotten. I feared a confrontation with Sgt. George and exercised poor judgment in not calling.

I have since verbally apologized to Sgt. George and Lt. Morrell and have been evaluated by Dr. Skotko. I now realize what I did and what my irresponsible behavior has caused. I extend my apologies to those affected by my actions and pray that I may be able to get back to the work that I so much love.

Respectfully submitted,

/s/ Javier W. Guzman
JAVIER W. GUZMAN Detective
Tactical Division

JWG:mas

[LOGO] **CITY OF TAMPA**

Sandra W. Freedman, Mayor

Police Department

Eduardo Gonzalez
Chief of Police

April 14, 1992

Inspector John Brown
Drug Enforcement Administration
5426 Bay Center Drive
Tampa, FL 33614

Dear Inspector Brown:

Our Department has completed its investigation in reference to a complaint filed by your department on January 14, 1992. The allegations made against Det. Javier Guzman have been Unfounded/Unwarranted.

If you should have need of further information relative to this complaint, you may contact Captain M. A. Williams of the Internal Affairs Bureau at 225-5851.

Sincerely,

EDUARDO GONZALEZ
Chief of Police

By: /s/ M. A. WILLIAMS
M. A. WILLIAMS, Captain
Internal Affairs Bureau

MAW: mlb

5 September 1989

TO: J.W. GUZMAN, Detective
Vice Control Bureau

FROM: T.C. SLATER, Sergeant
Vice Control Bureau

SUBJ: LETTER OF COUNSELING FOR FAILURE TO COMPLY
MANUAL OF REGULATIONS #1015 – DEPARTMENTAL POLICIES

This letter is to inform you that as a result of your incorrectly identifying a location within Hillsborough County that was suspected as being involved in illegal narcotic activities, a court authorized search warrant was signed and executed at the wrong location. During the period of July 10th through August 23, 1989, your investigation was focused on this inaccurate location.

As indicated by Tactical Division Intra-Division Procedure #802.04, titled "Vice and Organized Crime Raids", and in conjunction with Florida State Statute, Chapter 933 dealing with the issuance of a search warrant, the methods and procedures involved in establishing probable cause on the correct location is paramount.

The execution of this search warrant at the wrong location placed the members of the Raid Team and this Department in a precarious situation. Investigative mistakes of this nature obviously cannot be tolerated or condoned.

This letter will serve to advise you that investigative procedures and methods utilized by you during the course of an investigation must be completely followed through.

Any future incidents concerning matters of this nature will be addressed with progressive discipline.

/s/ T. C. Slater
T. C. SLATER,
Sergeant
Vice Control Bureau

/s/ J. W. Guzman
J.W. GUZMAN,
Detective
Vice Control Bureau

ACKNOWLEDGED:

/s/ A.B. Hatcher
A.B. HATCHER, Major
Tactical Division

## STATE AND LOCAL TASK FORCE AGREEMENT

This agreement is made this first day of October 1991, between the United States Department of Justice, Drug Enforcement Administration (hereinafter DEA), and the Tampa Police Department.

WHEREAS there is evidence that trafficking in narcotics and dangerous drugs exists in the Tampa Bay area and that such illegal activity has a substantial and detrimental effect on the health and general welfare of the people of Tampa Bay, Florida, the parties hereto agree to the following:

1. The Tampa Bay Task Force will perform the activities and duties described below:

   a. Disrupt the illicit drug traffic in the Tampa Bay area by immobilizing targeted violators and trafficking organizations;

   b. Gather and report intelligence data relating to trafficking in narcotics and dangerous drugs;

   c. Conduct undercover operations where appropriate and engage in other traditional methods of investigation in order that the Task Force's activities will result in effective prosecution before the Courts of the United States and the State of Florida.

2. To accomplish the objectives of the Tampa Bay Task Force, the Tampa Police Department agrees to detail one (1) experienced officer to the Tampa Bay Task Force for a period of not less than two years. During the period of assignment, the one officer will be under the direct

supervision and control of DEA supervisory personnel assigned to the Task Force.

3. The officer assigned to the Task Force shall adhere to DEA policies and procedures. Failure to adhere to DEA policies and procedures shall be grounds for dismissal from the Task Force.

4. The officer assigned to the Task Force shall be deputized as Task Force officers of DEA pursuant to 21 U.S.C. Section 878.

5. To accomplish the objectives of the Tampa Bay Task Force, DEA will assign three (3) Special Agents to the Task Force. DEA will also, subject to the availability of annually appropriated funds or any continuing resolution thereof, provide necessary funds and equipment to support the activities of the DEA Special Agents and officers assigned to the Task Force. This support will include: office space, office supplies, travel funds, funds for the purchase of evidence and information, investigative equipment, training, funds for overtime costs described below and other support items.

6. During the period of assignment to the Tampa Bay Task Force, the Tampa Police Department will remain responsible for establishing the salary and benefits, including overtime, of the officer assigned to the Task Force, and for making all payments due them. DEA will, subject to availability of funds, reimburse the Tampa Police Department for overtime payments to the officer assigned to the Tampa Bay Task Force, up to a sum equivalent to 25 percent of the salary of a GS-10, step 1, Federal employee (currently $28,322), per officer.

7. In no event will the Tampa Police Department charge any indirect cost rate to DEA for the administration or implementation of this agreement.

8. The Tampa Police Department shall maintain on a current basis complete and accurate records and accounts of all obligations and expenditures of funds under this agreement in accordance with generally accepted accounting principles and instructions provided by DEA to facilitate on-site inspection and auditing of such records and accounts.

9. The Tampa Police Department shall permit and have readily available for examination and auditing by DEA, the United States Department of Justice, the Comptroller General of the United States, and any of their duly authorized agents and representatives, any and all records, documents, accounts, invoices, receipts or expenditures relating to this agreement. The Tampa Police Department shall maintain all such reports and records until all audits and examinations are completed and resolved, or for a period of three (3) years after termination of this agreement, whichever is sooner.

10. The Tampa Police Department shall comply with Title VI of the Civil Rights Act of 1964 and all requirements imposed by or pursuant to the regulations of the United States Department of Justice implementing that law, 28 CFR Part 42, subparts C and D.

11. The Tampa Police Department agrees that an authorized officer or employee will execute and return to DEA the attached OJP Form 4061/2, Certification Regarding Debarment, Suspension and Other Responsibility Matters. The Tamp Police Department acknowledges that

this agreement will not take effect and no Federal funds will be awarded to the Tampa Police Department until the completed certification is received.

12. The Tampa Police Department agrees that an authorized officer or employee will execute and return to the DEA the attached OJP Form 4061/3, Certificate Regarding Drug-Free Workplace Requirements. The Tampa Police Department acknowledges that this agreement will not take effect and no Federal funds will be awarded to the Tampa Police Department by DEA until completed certification is received.

13. When issuing statements, press releases, requests for proposals, bid solicitations, and other documents describing projects or programs funded in whole or in part with the Federal money, the Tampa Police Department shall clearly state: (1) the percentage of the total cost of the program or project which will be financed with Federal money and (2) the dollar amount of Federal funds for the project or program.

14. The term of this agreement shall be from the date of signature by representative of all parties to September 30, 1992. This agreement may be terminated by either party on thirty (30) days advance written notice. Billings for all outstanding obligations must be received by DEA within 30 days of the date of termination of this agreement. DEA will be responsible only for obligations incurred by the Tampa Police Department during the term of this agreement.

For the Drug Enforcement Administration:

/s/ Michael Powers
Michael Powers
Assistant Special
Agent-in-Charge
Tampa District Office
Date: 9-27-91

Thomas V. Cash
Special Agent-in-Charge
Miami Field Division
Date: _____

For the Tampa Police Department:

/s/ T.A. Depolis
~~A.B. McLane, Chief~~
Date: 10-4-91